careful, and conscientious consideration, uninfluenced by sympathy or any consideration other than the evidence and the law as given to you in these instructions.

5

You should not consider or discuss the question of damages, if any, in this case until you have first determined whether or not the defendant is liable under the law to the plaintiff. If the jury finds from the evidence, and under the instructions of the Court that the defendant is not liable under the law, then you will have no occasion at all to consider the question of damages, if any. The fact that the Court has instructed you as to the measure of damages, if any, or that counsel for defendants has discussed or argued that question to you, must not be taken by you as any intimation on the part of the Court, or any intimation or admission on the part of counsel for the defendant that the plaintiff is entitled to recover any damages whatsoever.

6

The burden of proof is upon the plaintiff and he must prove his case by the preponderance or greater weight of the evidence before he can recover. If you find that the evidence does not preponderate in favor of the plaintiff, or if you find that the evidence is eve-ly balanced so that you are in doubt or unable to say which side has the preponderance of the evidence, or if the evidence preponderates in favor of the defendant, then in either of said events the plaintiff cannot recover, and you should find the defendant not guilty.

7

A quotient verdict is a verdict arrived at by each of the jurors setting down some figure in writing or otherwise, then the jury adding up the total of these twelve figures and dividing the said total by twelve to arrive at the amount of the verdict, each of the jurors having agreed in advance to be bound by the results. The Court further charges the jury that this is an improper method of arriving at a verdict, and the jury should not arrive at the verdict by so doing.

8

The Court instructs you that while the jury is the judge of the credibility of the witnesses, you have no right to disregard the testimony of an unimpeached witness for the defendant simply because such witness was or is an employee of the defendant, but it is your duty to receive the testimony of such witness in the light of all the evidence, the same as the testimony of any other witness, and determine his credibility by the same principles and tests you determine the credibility of any other witness.

9

[fol. 18] In order to recover in this case the plaintiff must prove his case by a preponderance or greater weight of the evidence. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing or ascertaining from their own personal knowledge the things to which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties; the apparent consistency, fairness, and congruity of the evidence; the probability or improbability of the truth of their several statements in view of all of the other evidence, facts, and circumstances proved on the trial, and from all these circumstances determine upon which side is the preponderance or greater weight of the evidence.

10

In considering this case and in passing upon your verdict you are not required to set aside your own common observation and experience as men and women in the affairs of life, but, on the other hand, you have the right, upon consideration of all of the evidence in this case, in the light of your own common observation and experience as men and women in the affairs of life, to say where the truth lies upon any issue in the case."

9. On November 21, 1949 said Appellate Court made and entered its order and judgment on said appeal in the words and figures as follows:

"No. 44745

William Edward Woods, Appellee

vs.

The New York, Chicago & St. Louis Railroad Company, a Corporation, Appellant

Appeal from Cook Superior

Error to —

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the judgment of the Superior Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County for such other and further proceedings as to law and justice shall appertain in conformity with the opinion of this Court this day filed herein. And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs, by it in this behalf expended to be taxed, and that it have execution therefore."

10. On the 29th day of November, 1949 and within the time allowed by law, your relator duly filed in said Appellate [fol. 19] Court a Petition for Rehearing, a copy of which is hereunto annexed and marked Exhibit 1 and hereby made a part hereof.

11. On the 2nd day of December, 1949, the said Appellate Court made and entered an order denying your re-

lator's Petition for Rehearing in the words and figures as follows:

"No. 44745

WILLIAM EDWARD WOODS, Appellee

vs.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, A CORPORATION, Appellant

Appeal from Cook Superior

Error to —

The Court having considered the petition of Appellee praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby denied."

12. On the 9th day of December, 1949 and within the time allowed by law, your relator duly filed in said Appellate Court a Petition for Leave to Appeal to this Court from said judgment of the Appellate Court and for a Certificate of Importance, a copy of which is hereto annexed and marked Exhibit 2, to which the defendant filed a response, a copy of which is hereto annexed and marked Exhibit 3.

13. On the 23rd day of December, 1949, said Appellate Court made and entered an order denying your relator's Petition for Leave to Appeal to this Court and for a Certificate of Importance in the words and figures, as follows:

"No. 44745

WILLIAM EDWARD WOODS, Appellee

vs.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, A CORPORATION, Appellant

Appeal from Cook Superior

The Court having considered the motion of Appellee for a Certificate of Importance and an Appeal to the Supreme Court of Illinois in said cause, as per peti-

tion filed herein, and having also considered the counter suggestions of the Appellant to said motion; and being now fully advised in the premises, doth order that said motion be and the same is hereby denied."

14. Your relator, as appears from the record and proceedings upon the trial of said action and as was established by the evidence without dispute or conflict therein, was on [fol. 20] the 14th day of November, 1946, employed by the defendant in said action, The New York, Chicago & St. Louis Railroad Company, a common carrier by railroad engaged in interstate commerce, and at about 11:50 P. M. on said day your relator suffered physical injury while so employed in interstate commerce through and by reason of the admitted negligence of the defendant, The New York, Chicago & St. Louis Railroad Company.

15. The evidence on the trial of the issues of said action established without dispute that your relator in the due and proper performance of his duties of his said employment as a freight brakeman, was riding on the stirrup on the side of the tender of the locomotive as it backed west on a track known as the O. P. Main in defendant's unlit railroad yard at Fort Wayne, Indiana, and was caught between the side of the tender and the side of a coal car standing on a siding which branched off from the O. P. Main track in such a position that it was too close to the O. P. Main track and fouled the same.

16. Assuming for the sake of this application that the evidence on the trial of the issues in said action with respect to the issues relating to the violation by the defendant of the Federal Boiler Inspection Act, (45 U. S. C. Sec. 23) and the Federal Safety Appliance Act (45 U. S. C. Sec. 11) was as stated in the opinion of said Appellate Court (although your relator claims that the evidence as stated in said opinion is more favorable to the defendant in said action than the record warrants), the decision of said Appellate Court is capricious and void and clearly contrary to the Federal Decisional Law governing and controlling your relator's federally created rights under said Federal Safety Statutes and deprives your relator of his right to a trial by jury and to the jury's proper determination of the issues guaranteed to your relator by the Seventh Amendment of the Constitution of the United States and

Article 2, Section 5 of the Constitution of the State of Illinois, and denies to your relator equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States and subjects your relator to a judicial wrong from which your relator has no remedy in violation of Article 2, Section 19 of the Constitution of the State of Illinois.

[fol. 21] 17. Your relator will be irreparably damaged and injured not only by the delay, expense and inconvenience of a retrial of said action in accordance with the opinion of the Appellate Court, but also may be deprived of the right to review the decision and judgment of the Appellate Court in the event said action is retried in accordance with said opinion and a verdict less favorable to your relator is rendered by the jury on such retrial. Your relator has been advised by counsel that under the local laws of the State of Illinois and the rules of court relating to and regulating the practice and procedure governing appeals and other forms of review of the judgment of the Appellate Court of Illinois in the present stage of proceedings in said action are such that there are doubtful questions involved as to the proper mode and method of review in your relator's efforts to vindicate and enforce his federally created rights in the premises and into and under the judgment of the Superior Court of Cook County. Your relator, therefore, is applying contemporaneously herewith to this Court for leave to appeal from the judgment of the Appellate Court of Illinois for the First District and is suing out a Writ of Error from this Court to said Appellate Court in order to enable this Court to pursue such method of review as it may determine to be proper and in order to exhaust all possible remedies to the end that your relator obtain in this Court an appropriate order or judgment reversing or expunging the judgment of the Appellate Court of Illinois for the First District and affirming or reinstating the judgment of the Superior Court of Cook County and such other or further relief in the premises to which your relator is entitled.

Wherefore, your petitioner prays:

1. That a preemptory Writ of Mandamus may issue out of this Honorable Court directed to the Honorable John M. Touhy, Presiding Justice, the Honorable Grover C.

Niemeyer, Justice, and the Honorable Michael Feinberg, Justice, constituting the First Division of the Appellate Court of Illinois for the First District, the relators herein, commanding them forthwith to expunge the judgment entered by them as the judges constituting the First Division of the Appellate Court of Illinois for the First District, [fol. 22] on November 21, 1949, reversing the judgment of the Superior Court of Cook County, Illinois in said cause entitled, William Edward Woods, Plaintiff, v. The New York, Chicago & St. Louis Railroad Company, a corporation, defendant, No. 47-S-1155, entered in said cause on the 7th day of May, 1948, and commanding said respondents to affirm said judgment of the Superior Court of Cook County, Illinois.

2. That summons issue against said respondents as provided by law returnable before the bar of this Honorable Court on such date as may be fixed.

People of the State of Illinois on Relation of William Edward Woods, Petitioner, by Harry G. Fuerst and Schwartzberg & Barnett by Mark T. Barnett, Attorneys for Petitioner, 77 West Washington Street, Chicago 2, Illinois.

STATE OF ILLINOIS,
County of Cook, ss:

Mark T. Barnett, being first duly sworn, on oath deposes and says that he is one of the attorneys for the petitioner in the foregoing petition; that he has read said petition by him subscribed; that he knows the contents thereof and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

Mark T. Barnett.

Subscribed and sworn to before me this 30th day of December, A. D. 1949. Alma A. Neumann, Notary Public. (Seal.)

[fol. 23] EXHIBIT 1

No. 44745

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, APRIL TERM, A. D. 1949

WILLIAM EDWARD WOODS, Appellee,

vs.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a Corporation, Appellant

Appeal from the Superior Court of Cook County

Honorable Wilbert F. Crowley, Judge Presiding

PETITION FOR REHEARING

Harry G. Fuerst, Schwartzberg & Barnett, Attorneys for Appellee, William Edward Woods.

[fol. 23-1] Now comes William Edward Woods, the plaintiff in the above entitled cause, by Harry G. Fuerst and Schwartzberg & Barnett, his attorneys, and presents his petition for rehearing of the above entitled cause and respectfully prays that a rehearing be granted in said cause upon the grounds and for the reasons hereinafter set forth in the petition herewith presented.

Harry G. Fuerst, Schwartzberg & Barnett, Attorneys for Plaintiff William Edward Woods.

[fol. 23-2] May It Please the Court:

Plaintiff respectfully asserts and urges that the Court has overlooked and misapprehended the following points:

1. The Court by its decision herein has erroneously denied to plaintiff the right to a trial by jury of the issues of fact as to whether the locomotive, its tender, parts and appurtenances, including the rear light on the tender, were in proper condition and safe to operate in the service to which the same were put without unnecessary peril to life or limb, as required by the provisions of the Federal Boiler Inspection Act (45 U. S. C. A. Sec. 23 et seq.; 36 Stat. 913; 38 Stat. 1192; 43 Stat. 659), and as to whether the injuries

sustained by plaintiff were caused or contributed to by defendant's unlawful use of an unsafe locomotive and appurtenances in violation of the provisions of said Act, contrary to the provisions of Article II, Sections 5 and 19, of the Constitution of the State of Illinois and the Seventh Amendment of the Constitution of the United States of America, and in violation of the right to a jury trial of such issues secured and guaranteed to plaintiff thereby.

2. The Court has erroneously decided federal questions, namely, whether the locomotive and tender, and all parts and appurtenances thereof, including the rear light on the tender, were in proper condition and safe to operate in the service to which the same were put without unnecessary peril to life or limb, as required by the provisions of the Federal Boiler Inspection Act (45 U. S. C. Sec. 23 et seq.; 36 Stat. 913; 38 Stat. 1192; 43 Stat. 629), and whether the injuries sustained by the plaintiff were caused or contributed to by defendant's unlawful use of an unsafe locomotive and appurtenances thereof, in violation of the provisions of said Act, contrary to the provisions of said Act, [fol. 23-3] and to the applicable and controlling federal decisional law interpreting and applying said Act.

3. The Court overlooked and misapprehended the scope and effect of the Federal Boiler Inspection Act and of the power of the Interstate Commerce Commission to make rules and regulations thereunder and of the rules which have been promulgated, and of the failure of the Interstate Commerce Commission to make other rules.

4. The Court overlooked or misapprehended, or both, the testimony of plaintiff and of defendant's witnesses with respect to visibility of objects, including the fouling coal car, and the patent fact that if the rear light on the coal car had cast its light along the ground instead of up in the air the dangerous position of the coal car would have been disclosed to plaintiff and to the engineer long before it was seen by either of them and that the peril to which plaintiff was exposed would have been avoided or minimized and was wholly unnecessary.

5. The Court by its decision herein has erroneously denied to plaintiff the right to a trial by jury of the issues of fact as to whether the coal car was equipped with an efficient hand brake, as required by the provisions of the

Federal Safety Appliance Act (45 U. S. C. Sec. 11, 36 Stat. 298) and as to whether plaintiff's injuries were caused or contributed to by defendant's unlawful use of a coal car not equipped with an efficient hand brake, in violation of the provisions of said Act, contrary to the provisions of Article II, Sections 5 and 19 of the Constitution of the State of Illinois and the Seventh Amendment of the Constitution of the United States of America, and in violation of the right to a jury trial of such issues secured and guaranteed to plaintiff thereby.

[fol. 23-4] 6. The Court has erroneously decided federal questions, namely, whether the coal car was equipped with an efficient hand brake, as required by the provisions of the Federal Safety Appliance Act (45 U. S. C. Sec. 11; 36 Stat. 298) and whether plaintiff's injuries were caused or contributed to by defendant's unlawful use of a coal car not equipped with an efficient hand brake, in violation of the provisions of said Act, contrary to the provisions of said Act and to the applicable and controlling federal decisional law interpreting and applying said Act.

7. The Court overlooked the positive uncontradicted testimony of the plaintiff, admitted expressly without objection, that the hand brake on the coal car was not efficient.

8. The Court erred and invaded the province of the jury in undertaking to redetermine, contrary to the permissible finding of the jury, the issue whether the hand brake on the coal car was efficient.

Plaintiff's Point I

The decision of this Court is contrary to the letter and spirit of the Statutes and the Federal Decisional Law which should control its decision, and seriously prejudices the enforcement of plaintiff's rights thereunder

This is an admitted liability case and plaintiff has already lost in excess of $12,000 in wages by reason of injuries sustained as a result of defendant's admitted negligence. The mandates of the United States Supreme Court and of the Supreme Court of the State of Illinois by their most recent decisions have definitely ordered inferior courts liberally to interpret the purposes of the Federal acts governing and controlling the case at bar. This Court, in its consideration

of this cause, should be guided by the principles announced by the recent controlling State and Federal decisions, well set forth by the United States Court of Appeals for the [fol. 23-5] 8th Circuit on March 14, 1949, in *Louisville & N. R. Co.* v. *Botts,* 173 F. 2d 164 as follows:

> "In this connection, heed necessarily must be given to unmistakable teaching of the Supreme Court in its recent decisions, that trial and appellate courts, both Federal and State, on questions of liability under the Federal Employers' Liability Act, have been taking too narrow a view generally of the scope of permissive inference which is open to a jury on 'probative facts'. As one of the Justices has expressed it, in indicating the purpose of that Court's repeated overturning of decisions in such cases during the past few years (approximately 20 since 1943), 'the historic role of the jury in performing that function * * * is being restored in this important class of cases'. See concurring opinion of Mr. Justice Douglas in *Wilkerson* v. *McCarthy,* 69 S. Ct. 413, 422.

We submit that the decision of this court invades the province of the jury and destroys the railroad worker's constitutional and statutory rights under the applicable decisions of the highest courts of the state and of the national government to jury determination of issues of fact in this cause.

The decision of this court is particularly prejudicial to the rights of the plaintiff in the case at bar inasmuch as it may be construed, especially with reference to the Boiler Inspection Act, to finally determine the law of the case to the effect that the plaintiff is not entitled to recover under and to have his damages assessed in accordance with the rules applicable in cases where the injury was caused or contributed to by violation of the safety statutes.

In view of the defendant's admitted liability under the Federal Employers' Liability Act, a judgment in favor of the plaintiff in some amount is assured, but the measure of his recovery under the ruling of this court may be reduced in the event the jury should find that he was guilty of negli- [fol. 23-6] gence which contributed to his injuries. On any retrial of the issues, the trial court would be bound to conform to the mandate of this Court, and, if the evidence be the same, to withhold from the plaintiff the benefits afforded by the Boiler Inspection and Safety Appliance Acts.

Ordinarily a party prevailing at the trial cannot appeal from a judgment in his favor and there is therefore the possibility that the plaintiff may have difficulty in obtaining a review of this court's rulings with respect to the plaintiff's right to recover under the safety statutes.

We therefore earnestly urge this Court to review its decision in this case and to conform it to the applicable Federal Decisional Law by which its decision should be guided.

Plaintiff's Point II

The evidence warranted a jury finding, which this Court should not disturb, that plaintiff's injuries were contributed to by defendant's violation of the Boiler Inspection Act

The Boiler Inspection Act by the decision of this court is denuded of its primary, positive, and clear command, namely, forbidding the use by common carriers engaged in interstate commerce of any locomotive, boiler, tender, and all parts and appurtenances thereof, which are not in proper condition and safe to operate in the service to which they are put without unnecessary peril to life and limb. This decision substitutes for that command the provisions of the act which were designed merely to implement it by authorizing the Interstate Commerce Commission to enforce it, and, to that end, to require specific minimum requirements to effectuate its purpose.

Our contention is that no ruling or regulation by the Interstate Commerce Commission is necessary to bring within [fol. 23-7] the scope or command of the statute a rear light which was in fact installed by the defendant on the tender as a permanent, integral and essential part thereof, and that the fact that the Interstate Commerce Commission has promulgated rules requiring headlights under certain circumstances does not exempt from the statute a light or any other part or safety device which has been supplied by the carrier and which is actually a part and appurtenance of the locomotive.

The first of the series of rules prescribed by the Interstate Commerce Commission respecting locomotives, of which Rules 129 and 131 relating to headlights are a part,

is (Code of Federal Regulations, Title 49, Parts 1-91, § 91.1, p. 1236).

> Rule 101. "The railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control."

There ensue certain requirements with respect to ash pans and other parts including sanders. The most recent decision of the United States Supreme Court in *Urie* v. *Thompson*, 69 S. Ct. 1018, relating to sanders clearly demonstrates the error into which this court has fallen in holding that: "Defendant being under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the act, was not properly focused."

In *Urie* v. *Thompson*, 69 S. Ct. 1018 (May 31, 1949), an action to recover damages for silicosis contracted over a period of years from the inhalation of silica dust alleged to have been caused by faultily adjusted sanders which allowed excessive quantities of silica sand to escape, the Supreme Court held that the jury was justified in finding [fol. 23-8] that the railroad company "had breached the Boiler Inspection Act (as more specifically articulated in I. C. C. Rule 120, governing sanders) and (2) that such breach was a proximate cause of petitioner's injury."

In connection with that ruling, the footnote (34) states in part:

> "I. C. C. Rule 120, 49 C. F. R. Secs. 91 and 120, applicable to steam locomotives provides: 'Locomotives shall be equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails'.
>
> "It is of no consequence that Rule 120 may not have been specifically called to the jury's attention. *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 488, 489. It is urged upon us that Rule 120 was designed to insure an adequate auxiliary breaking system rather than to protect employees against silicosis, and hence that, notwithstanding respondent's breach of the rule and the governing statute, petitioner cannot complain

of an injury flowing from the breach which was not the injury the Interstate Commerce Commission sought to guard against. We do not dispute the narrow scope of Rule 120; nor do we doubt that conventional tort doctrine imposes absolute liability for violation of a statutory duty only where the injury is one the statute was designed to prevent. (Citing cases) But we think the liability imposed by the Boiler Inspection Act is of broader character and that the correct rule is the one laid down in *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617, 621, which this Court has had repeated occasion to apply in connection with the Safety Appliance Acts: 'The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars [fol. 23-9] not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever failure to obey these Safety Appliance Laws is a proximate cause of injury to them when engaged in the discharge of duty'."

In *Louisville & N. R. Co.* v. *Botts* (C. C. A. 8th, March 14, 1949), 173 F. 2d 164, where the claimed violation of the Boiler Inspection Act was that the footboard on a locomotive which conformed literally to the Interstate Commerce Commission regulation was bolted to the hangers by bolts protruding slightly above the surface of the footboard and caused plaintiff to slip, the Circuit Court of Appeals said:

"But appellant argues, that there can be no violation of the Boiler Inspection Act, unless some regulation or order of the Interstate Commerce Commission made under the Act has been violated. As to switch engine footboards, it appears that the Commission has established regulations governing the number, dimensions and location thereof, and the size and number of their hanger brackets, but, other than to provide that the tread of the footboard shall be 'securely bolted' to

the hangers, it has made no prescription on the kind of bolts to be used in the tread or the manner of their application. See 49 Code of Fed. Regulations, Sec. 131.16(a) (4).

"The language of the Act affords no basis for the argument which appellant makes. It is to be noted that Section 2, 45 U. S. C. A. Sec. 23, provides that a carrier may not use a locomotive, 'unless' it and all its parts are in proper condition and safe to operate, without unnecessary peril to life or limb, in the service to which the locomotive is put, '*and* unless' it has been subjected to the inspections provided for in [fol. 23-10] the Act, '*and*' it meets such tests 'as *may* be prescribed' in the rules or regulations of the Interstate Commerce Commission. (Italics ours). The effect of this is to impose three conditions on a carrier's right to use a locomotive: (1) All parts of the locomotive must be safe to operate, without unnecessary peril to life or limb, in the service to which the locomotive is put; (2) the locomotive must have been submitted to the inspections provided for in the Act; and (3) the locomotive and its parts must meet such tests and conform to such standards as the Interstate Commerce Commission may have prescribed or approved.

"These on their face are coordinate conditions and commands, and the clauses therefore are not simply coincident. Thus under the third clause, the Interstate Commerce Commission could hardly practicably be expected to lay down specifications of every individual item or element involved in the construction of the locomotive and its parts, but plainly Congress did not intend that any such non-prescription by the Commission should operate to relieve a carrier of its absolute obligation under the first clause, not to use any locomotive that is unsafe to operate, without unnecessary peril to life or limb, in the service to which it is put. The mere fact therefore that the third clause of the section of the statute has not been violated does not permit of a judicial ruling that there consequently in the present situation has been no violation of the first clause."

There is no longer any question in this State but that the federal decisional law must be applied to cases aris-

ing under the Federal Employers' Liability Act, supplemented by the Federal Boiler Inspection Act and the Federal Safety Appliance Act. See *Williams* v. *New York Central R. Co.*, 402 Ill. 494, reversing 335 Ill. App. 159.

We submit that this Court's reliance on the decision in *Auschwitz* v. *Wabash Railroad Co.*, 346 Ill. 190, decided [fol. 23-11] in 1931 before the 1939 amendments of the Federal Employers' Liability Act and the current unmistakable trend of the decisions of the United States Supreme Court in relation to these railroad cases, is untenable. The United States Circuit Court of Appeals for the 2nd Circuit in *Bolan* v. *Lehigh Valley R. Co.* (May 10, 1948) 167 F. 2d 934, on almost identical facts as those involved in the *Auschwitz* case, said:

> "In support of its first argument (that there was insufficient evidence to warrant finding that defendant had violated the Boiler Inspection Act) appellant relies chiefly on the undisputed fact that the pilot step complied with the Commission's regulation governing such steps. We think such compliance, however, did not relieve appellant of its duty under the Boiler Inspection Act to maintain all appurtenances of its engine (of which the pilot step is one) 'in proper condition and safe to operate * * * that the same may be employed in the active service of such carrier without unnecessary peril to life or limb'. The Commission's regulation, captioned 'Sill-Steps,' merely provides for the number, dimensions, location and manner of application of such steps. A step may comply with these directions and yet be in a highly dangerous condition because it is worn or bent. There was testimony from which the jury could have found that such was the case here; and apparently they did so find, since they answered the third interrogatory (Was the engine and all its appurtenances including the pilot step, in proper condition and safe to operate without unnecessary peril to life or limb?) 'No'. The statute is to be construed in the light of its humanitarian objectives. Accordingly, if an appurtenance conforms with the I. C. C. regulations but nevertheless violates the Act, the latter must control."

We submit that the cases of *Mahutga* v. *M. St. P. & S. S. M. Ry. Co.*, 182 Minn. 262, and *A. T. & S. F. Ry. Co.* v.

[fol. 23-12] *Scarlett*, 300 U. S. 471, are clearly distinguishable from the situation in the case at bar.

In the *Mahutga* case, the plaintiff claimed a violation of the Boiler Inspection Act because the railroad company did not provide some means of fastening the cab curtain back, although no such requirement was contained in the order of the Interstate Commerce Commission prescribing in detail the requirements with respect to such curtains. The curtains, in fact, conformed strictly to the requirements of the Interstate Commerce Commission. It was not claimed, as it is in the case at bar, that there was anything out of order, defective or not properly functioning with respect to the appurtenance.

In the *Scarlett* case, the claim was that a ladder on a box car which was not defective and which complied with the regulations of the Interstate Commerce Commission violated the Boiler Inspection Act because round brace rods on the side of the car which formed no part of the ladder itself rendered the use of the ladder dangerous despite the fact that the ladder cleared the brace rod more than the minimum distance required by the order of the Interstate Commerce Commission for such clearance.

In the case at bar, unlike those cases, there was as this Court has said: "An issue of fact to be determined by the jury * * * if * * * (the) defect in the light can be made the basis of an action under the Boiler Inspection Act". Plaintiff's testimony was that it shone upward at an angle of 45° "instead of down toward the tracks like it should", leaving the area and the immediate vicinity of the backing locomotive in darkness. (A. 15-18)

Contrary to the statement of the Court in its opinion that "No claim can be made that the projection of the rays of this light into the air created 'unnecessary peril to life or [fol. 23-13] limb' in the operation of the engine.", the United States Supreme Court in *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, declining to pass on the question as to whether a light was required by Rule 131 and holding that the absence of any rear light on the engine, which would have been obscured by the cars it was pushing, could be found to be a violation of the Boiler Inspection Act, said:

> "The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard."

We submit that this Court's statement that the defective light could not be held to "create" an unnecessary peril to life or limb evidences a misapprehension with respect to the requirements of the Boiler Inspection Act. It is not necessary for a defective appliance to "create" an additional hazard, but it is required that all parts and appurtenances of a locomotive should be in such condition as to avoid unnecessary perils.

We submit it cannot be reasonably contended that a light, affixed to the tender of this locomotive which was in such a condition that its light was thrown upward into the air instead of along the tracks as it was intended to be by the fixed focused method of application, entailed no unnecessary hazard and peril or that such unnecessary hazard and peril would not have been avoided if the light had shone straight back along the tracks. If it had been in proper working order it would have disclosed the close proximity of the coal car to the main track long before the situation was or could have been observed by the plaintiff or by the engineer if plaintiff's testimony be true.

As was said in *Southern Pacific Co.* v. *Lunsford*, 297 U. S. 398, and as was held in *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, and *Hines* v. *Smith*, 275 Fed. 766, a defective [fol. 23-14] part or appurtenance of a locomotive if actually a permanent and integral part thereof, which by reason of the defect fails to avoid unnecessary peril constitutes a violation of the Boiler Inspection Act, whether or not the part or appurtenance is required or covered by any order of the Interstate Commerce Commission.

The railroad company, knowing the service to which the locomotive was to be put, equipped it with a rear light with a fixed focus, the only purpose of which could have been to provide for safety when the locomotive was backing as the locomotive in the case at bar was doing when plaintiff was injured. If it were out of order, entailing unnecessary peril which would have been avoided by having the light in proper condition, the jury was warranted in finding that the Boiler Inspection Act was violated, and that such violation contributed to cause plaintiff's injuries.

Plaintiff's Point III

There was substantial evidence of the inefficiency of the hand brake on the coal car and that such inefficiency proximately contributed to cause plaintiff's injuries

The Court has overlooked the testimony of the plaintiff, admitted expressly without objection and not contradicted, that the hand brake on the coal car was not efficient and permitted the car to drift from the safe position in the clear when a regular yard brakeman was seen setting the brake to the position where it fouled the main track. (A. 20-23, R. 76-79, Plaintiff's Brief, 13, 27, 46)

The evidence, on direct examination of the plaintiff, is as follows (A. 20-23):

"I saw the coal car in the clear around a quarter after nine to 9:30.

[fol. 23-15] "Mr. Fuerst: At that time did you see anyone setting the brakes on that coal car?

"A. Yes, sir.

"Mr. Moir: Was that p. m. when he saw that?

"Mr. Fuerst: 9:15 p. m.

"Q. That was when you were going to work was it?

"A. That is correct, yes, sir.

"Q. Now who was it that was setting the brake at that time?

"A. Well, he was a regular yard brakeman.

"Q. Of your company?

"A. Of the Nickel Plate, yes, sir.

"Q. Now when brakes are set on cars, these hand brakes, and they function efficiently, from your experience, and you have had experience haven't you?

"A. Yes, sir.

"Q. In setting brakes?

"A. Yes, sir.

"Q. But when they are functioning efficiently do cars—do they hold the cars in place where they are braked?

"A. Yes, they do.

* * * * * * *

"Q. Are you familiar with the braking equipment on these coal cars that was involved in your accident? Are

you familiar with the braking equipment, the hand brakes, the use of them?

"A. Yes.

"Q. When they are applied what is the function and purpose of those brakes?

"A. When they are what?

"Q. When they are applied?

"A. Applied?

[fol. 23-16] "Q. Yes, when they are put on?

"A. That is what puts the brake itself on. The iron pushes ag'in the wheels.

"Q. And what happens to the car?

"A. It is locked, it can't move.

"Q. Now when the brakes are not functioning efficiently and you apply the brakes, what happens to the car on a slope?

"A. On a slope it will drift. It will move. It won't be held stationary there.

"Q. Well, when they drift, from your experience, after the brakes have been applied, have you an opinion as to whether those brakes are efficient or inefficient?

"Mr. Moir: I think that invades the province of the jury, if your Honor please.

"The Court: No, he may answer that. Objection overruled.

"Mr. Moir: And then, of course, as shown, he is not qualified to answer the question. I would like to add that objection.

"The Court: I will overrule the objection, counsel.

"Mr. Fuerst: You may answer.

"A. Yes, I have an opinion whether they are efficient.

"Q. What would you say, from the point where the brake was applied, where you saw it applied where this car was in the clear, to where the car was when you started to work with your engine and your body came in contact with that car, whether that brake was efficient?

"Mr. Moir: I object to that, if your Honor please.

"The Court: Objection sustained.

"Mr. Fuerst: May I respectfully——

[fol. 23-17] "Mr. Moir: Just a minute, if your Honor please. I withdraw the objection. Proceed.

"The Court: All right.
"Mr. Moir: Have the question read.

(Question read.)

"A. No, I would say it wasn't.

"Mr. Fuerst:

"Q. When brakes are set on cars and they are working efficiently do they permit the cars to drift?
"A. No, sir."

We submit that this is direct positive evidence that the hand brake on the coal car was inefficient and that it is not contradicted by any evidence offered by the defendant.

In stating that:

> "No inference of inefficiency of the brake can be drawn from the mere fact that plaintiff saw a switchman setting the brake—an incomplete operation— * * * It must first be shown that the brake was actually set, with due care and in the normal natural and usual manner."

we submit that the Court has overlooked the wholly permissible and natural inference that a regular yard brakeman setting a brake would do so with due care and in the normal, natural and usual manner.

But beyond that, the testimony of the plaintiff, himself an experienced brakeman, that the brake was not efficient is itself primary evidence of the fact. In *Bratt* v. *Western Airlines*, 155 F. 2d 850, it was said:

> "A witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research."

As to the direction of the slope of the spur track, we submit that the testimony of the defendant's witnesses viewed [fol. 23-18] most favorably to the defendant, was at best ambiguous, as conceded, except as to the testimony of the witness Farr, by the defendant's reply brief, p. 7.

We submit that the Court has overlooked Defendant's Exhibit 2, (R. 347, A. 40, 41, 123) which discloses, and from which the jury would be warranted in finding, that the spur

track rises after branching off the main track as it comes into the foreground of the photograph.

In any event, we submit that the meaning of testimony of defendant's witnesses and their credibility, as well as what that photograph disclosed, was for the jury, and not for this Court, to decide.

Conclusion

We respectfully urge that a rehearing should be granted, and that, on such rehearing, the judgment of the trial court should be affirmed.

Respectfully submitted, Harry G. Fuerst, Schwartzberg & Barnett, Attorneys for Plaintiff.

[fol. 23a] EXHIBIT 2

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, APRIL TERM, A. D. 1949

No. 44745

WILLIAM EDWARD WOODS, Appellee,

vs.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a Corporation, Appellant

Appeal from the Superior Court of Cook County

Honorable Wilbert F. Crowley, Judge Presiding

NOTICE

To Winston, Strawn, Shaw & Black, 38 South Dearborn Street, Chicago, Illinois, Attorneys for Appellant:

Please take notice that on the 9th day of December, A. D. 1949, we shall file in the Office of the Clerk of the Appellate Court of Illinois for the First District, 30 North Michigan Avenue, Chicago, Illinois, a petition for leave to appeal and for a Certificate of Importance, copy of which is herewith served upon you.

Harry G. Fuerst and Schwartzberg & Barnett, Attorneys for Appellee, William Edward Woods.

Received a copy of the above notice, together with copy of the Petition for Appeal and Certificate of Importance this 8th day of December, A. D. 1949.

—— ——.

[fol. 24] In the Appellate Court of Illinois, First District, April Term, A. D. 1949

William Edward Woods, Appellee,

vs.

The New York, Chicago & St. Louis Railroad Company, a Corporation, Appellant

Appeal from the Superior Court of Cook County

Honorable Wilbert F. Crowley, Judge Presiding

Petition for Leave to Appeal and for Certificate of Importance

Now comes your petitioner, William Edward Woods, appellee, by Harry G. Fuerst and Schwartzberg & Barnett, his attorneys, and petitions this Court for leave to appeal to the Supreme Court of Illinois from the Judgment which was entered in the above entitled cause on November 21, 1949, and for a Certificate of Importance to be issued by this Court that there is herein involved questions of such importance, either on account of principle or collateral interests, as that it should be passed upon by the Supreme Court of Illinois, and shows unto the Court the following reasons why the petition should be allowed:

1. The decision of this Court to the effect that violation of the Federal Boiler Inspection Act, 45 U.S.C. Sec. 23, cannot be predicated upon the condition of the light on the rear of the tender involves a question of importance to all railroad employees who engage in interstate commerce, to all common carriers by railroad engaged in interstate commerce, and to the public at large, and is contrary to the provisions of said act and to the applicable and controlling decisions of the Supreme Court

of the United States interpreting and applying said act, [fol. 25] as well as to the controlling decisions of the Supreme Court of the State of Illinois, namely, *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574; *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481; *Urie* v. *Thompson* (decided May 31, 1949) 69 S. Ct. 1018; *Williams* v. *New York Central R. Co.*, 204 Ill. 494, and the other cases cited by your petitioner in his brief and argument as appellee herein, and in his petition for rehearing.

2. The decision of this Court to the effect that the evidence adduced on the trial of this cause was not sufficient to warrant the jury in finding that the coal car was not equipped with an efficient hand brake as required by the provisions of the Federal Safety Appliance Act, 45 U. S. C. Sec. 11, involves a question of importance to all railroad employees engaged in interstate commerce, to all common carriers by railroad engaged in interstate commerce, and to the public at large, and is contrary to the provisions of said act and to the applicable and controlling decisions of the Supreme Court of the United States interpreting and applying said act, as well as to the controlling decisions of the Supreme Court of the State of Illinois, namely, *Meyers* v. *Redding Co.*, 331 U. S. 477; *Lavender* v. *Kurn*, 327 U. S. 645; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350; *Williams* v. *New York Central R. Co.*, 402 Ill. 494, and the other cases cited by your petitioner in his brief and argument as appellee herein, and in his petition for rehearing.

3. The decision of this Court deprives your petitioner, appellee herein, of property without due process of law and of equal protection of the laws, contrary to and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States of America in that it denies to your petitioner the right to a trial by jury of the issues of fact as set forth in paragraphs 1 and 5 and erroneously decides federal questions, contrary to the applicable and controlling statutes and federal decisions as set forth in paragraphs 2 and 6 of your petitioner's petition for a rehearing herein.

Harry G. Fuerst and Schwartzberg & Barnett, Attorneys for Appellee, William Edward Woods.

[fol. 25a] EXHIBIT "3"

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, APRIL TERM, A. D. 1949

No. 44745

WILLIAM EDWARD WOODS, Appellee,

vs.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a Corporation, Appellant

Appeal from the Superior Court of Cook County

Honorable Wilbert F. Crowley, Judge Presiding

NOTICE

To Messrs. Schwartzberg & Barnett and Harry G. Fuerst, 77 West Washington Street, Chicago 2, Illinois:

Please take notice that on the 9th day of December, A. D. 1949, we shall file in the Office of the Clerk of the Appellate Court of Illinois for the First District, 30 North Michigan Avenue, Chicago, Illinois, a Response to Appellee's Petition for Leave to Appeal and For Certificate of Importance, copy of which Response is herewith served upon you.

(S.) Winston, Strawn, Shaw & Black, Attorneys for Appellant.

Received a copy of the above Notice, together with a copy of Response to Appellee's Petition for Leave to Appeal and For Certificate of Importance, this 9th day of December, A. D. 1949. ——— ———, ——— ———, Attorneys for Appellee.

[fol. 26] In the Appellate Court of Illinois, First District, April Term, A. D. 1949

No. 44745

William Edward Woods, Appellee,

vs.

The New York, Chicago & St. Louis Railroad Company, a corporation, Appellant

Appeal from the Superior Court of Cook County

Honorable Wilbert F. Crowley, Judge Presiding

Response to Appellee's Petition for Leave to Appeal and for Certificate of Importance

Now comes The New York, Chicago and St. Louis Railroad Company, a corporation, Appellant, by Winston, Strawn, Shaw & Black, its attorneys, and files this, its Response to Appellee's Petition for Leave to Appeal to the Supreme Court of Illinois and For Certificate of Importance, and in answer to said Petition, shows unto the Court the following reasons why it should not be granted:

A Certificate of Importance Cannot be Granted Because the Judgment in this Case is Not Final

The judgment entered by this Court on November 21, 1949, reversed the judgment of the lower court and remanded the cause for further proceedings in conformity with the Court's opinion. On redocketing, the case will stand for retrial. This is obviously not a final judgment. *Corcoran* v. *City of Chicago*, 373 Ill. 567, 569; *Read* v. *Boyle*, 234 Ill. 105. A review of the judgments, orders, and decrees of the Appellate Court by the Supreme Court can [fol. 27] only be had where such judgment, order, or decree is final. Where a judgment of the Appellate Court is not final "the Appellate Court in such case has no power to allow an appeal and grant a Certificate of Importance". *Dowdall* v. *Hutchens*, 347 Ill. 326, 327; *Read* v. *Boyle*, 234 Ill. 105.

The Case is Not of Such Character as to Warrant the Court Granting a Certificate

This Court reversed the judgment on behalf of the plaintiff because the evidence did not warrant the giving of instructions permitting recovery under the Safety Appliance and Boiler Inspection acts. The Court's decision on these questions, while of importance to the parties, represents an application of principles to a *sui generis* factual situation. A case less calling for the granting of a Certificate of Importance can hardly be visualized. "The litigant whose case has been reviewed in the Appellate Court has truly had his day in a court of review, and unless there is involved some question the decision of which is important in more than a narrowly private sense, the basis for a certificate of importance cannot be said to be present." Nichols Illinois Civil Practice, Vol. 5, p. 635.

Wherefore, Appellant prays that Appellee's Petition be either dismissed or denied.

Respectfully submitted, (Sgd.) Winston Strawn, Shaw & Black, Attorneys for Appellant.

[fol. 28] [Endorsed:] In the Supreme Court of Illinois, The People of the State of Illinois on Relation of William Edward Woods, Petitioner v. John M. Touhy, Presiding Justice, Grover C. Niemeyer & Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Petition for Leave to File Application for Writ of Mandamus and Petition for Mandamus. Harry G. Fuerst and Schwartzberg & Barnett, Attorneys and Counselors, 77 West Washington Street, Phone Randolph 6-3555, Chicago 2.

[fol. 29] And, on the same day, to-wit: the 31st of December, A.D. 1949, there was filed in the Office of the Clerk of the Supreme Court certain suggestions and authorities in support of petition for leave to file application for writ of mandamus, which are in the words and figures following, to-wit:

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No. 31427

IN THE

Supreme Court of Illinois

JANUARY TERM, A. D. 1950.

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS, Petitioner, vs. JOHN M. TOUHY, PRESIDING JUSTICE, GROVER C. NIEMEYER and MICHAEL FEINBERG, JUSTICES, CONSTITUTING THE FIRST DIVISION OF THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT, Respondents.	Petition for leave to file Application for Writ of Mandamus.

SUGGESTIONS AND AUTHORITIES IN SUPPORT OF PETITION FOR LEAVE TO FILE APPLICATION FOR WRIT OF MANDAMUS.

HARRY G. FUERST
SCHWARTZBERG & BARNETT
Attorneys for Petitioner.

HARRY G. FUERST
Of Counsel

The Scheffer Press, Inc.—FInancial 6-2694

IN THE

SUPREME COURT OF ILLINOIS

JANUARY TERM, A. D. 1950.

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS, Petitioner, vs. JOHN M. TOUHY, PRESIDING JUSTICE, GROVER C. NIEMEYER and MICHAEL FEINBERG, JUSTICES, CONSTITUTING THE FIRST DIVISION OF THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT, Respondents.	Petition for leave to file Application for Writ of Mandamus.

SUGGESTIONS AND AUTHORITIES IN SUPPORT OF PETITION FOR LEAVE TO FILE APPLICATION FOR WRIT OF MANDAMUS.

The relator is filing contemporaneously herewith a petition for leave to appeal from the judgment of the Appellate Court of Illinois for the First District entered November 21, 1949, becoming final December 2, 1949, reversing a judgment in favor of the relator for the sum of Forty Thousand Dollars ($40,000.00) entered in the Superior Court of Cook County on May 7, 1948, and after trial of the issues before the Honorable Wilbert F. Crowley and a jury in said Court, in an action brought by the relator against The New York, Chicago & St. Louis Railroad Company, a corporation, and remanding said cause to the Superior Court of Cook County for further proceedings in conformity with the opinion of said Appellate Court.

At the time the Petition for Leave to File an Application for Writ of Mandamus was filed in the Office of the Clerk of this Court on December 31, 1949, a brief three page typewritten "Suggestions and Memorandum In Support of Petition for Leave to File Application for Writ of Mandamus" was filed requesting leave to refer to the suggestions and authorities contained in the petition for leave to appeal in support of this petition for leave to file an application for writ of mandamus. At the time of the filing we were given to understand that it might serve the convenience of the Court to file a complete brief in this case number, and we now beg leave to do so.

STATEMENT OF THE CASE.

The relator is the victim of procedural difficulties which threaten to inflict irreparable damage and injury upon the relator in the enforcement of his federally created rights under the provisions of the Federal Employers' Liability Act (45 U.S.C. Secs. 51-60) the Federal Boiler Inspection Act (45 U.S.C. Sec. 23) and the Federal Safety Appliance Act (45 U.S.C. Sec. 11). Under the local laws of the State of Illinois and the rules of court relating to and regulating practice and procedure governing appeals and other forms of review, the judgment of the Appellate Court of Illinois in the present stage of preceedings is such that there are doubtful questions involved as to the proper mode and method of review, in the relator's efforts to vindicate and enforce his federally created rights in the premises and into and under the judgment of the Superior Court of Cook County in his favor against The New York, Chicago & St. Louis Railroad Company for Forty Thousand Dollars ($40,000.00), the damages found by the jury for injuries sustained by the relator as a result of the *admitted* negligence of The New York, Chicago & St. Louis Railroad Company.

In order to exhaust all proper remedies to the end that the relator obtain in this Court an appropriate order or judgment reversing or expunging the judgment of the Appellate Court of Illinois for the First District and affirming or reinstating the judgment of the Superior Court of Cook County, and in order to enable this Court to pursue such method of review as it may determine to be proper, the relator has also sued out a Writ of Error from this Court to the Appellate Court.

As stated in the opinion of the Appellate Court, printed in full as Exhibit A at the end of this document:

> "Plaintiff was injured in defendant's Fort Wayne, Indiana yard on November 14, 1946 at about 11:50 P. M. in the performance of his duties as a road brakeman engaged with his crew, consisting of the engineer, fireman, conductor and another brakeman, in backing an engine and tender on a main track (O. P. Main) in order to couple to an interstate train * * * for movement to Bellevue, Ohio by plaintiff's crew. The main track runs east and west and the engine was backing toward the west. A spur track came off the main track at an angle toward the south and west. Plaintiff was on the southwest corner of the tender when close to the junction with the spur track he saw a coal car spotted near the main track and attempted to get around the corner of the tender to a wheel at the back."

Assuming as we must on this application (although the relator claims that the facts as stated in the opinion of the Appellate Court is more favorable to the defendant than the record warrants):

> "He was brushed off as the tender passed the coal car and sustained injuries for which he brought suit. (Under the provisions of the Federal Employers' Liability Act, 45 U.S.C. Secs, 51 et seq., the Federal Safety Appliance Act, 45 U.S.C. Sec. 11 and the

Federal Boiler Inspection Act, 45 U.S.C. Sec. 23). Defendant admits its liability under the Federal Employers' Liability Act in failing to provide the plaintiff with a reasonably safe place in which to work and failing to provide sufficient clearance between the spotted coal car and the moving engine and tender. It denies liability under the Safety Appliance and Boiler Inspection Acts as defined by the instructions to the jury given at plaintiff's request. Defendant's liability under the first of the two acts last mentioned is based on its alleged failure to provide sufficient hand brakes on the coal car and under the second act upon its alleged failure to equip the rear of the tender with an efficient and properly focused light.

"On appeal defendant's principal contentions are, that the court erred in giving instructions permitting recovery under the Safety Appliance and Boiler Inspection Acts because there is no evidence of the violation of either, and, that the damages awarded are excessive." (Matter in parenthesis ours.)

The Appellate Court, as appears from its opinion, ignoring the teachings of the recent decisions of the United States Supreme Court which this Court in *Williams* v. *New York Central R. Co.*, 402 Ill. 494 has emphatically and unreservedly held must be observed and applied in the determination of the federally created rights under these federal statutes, held that the relator was not entitled to recover under the Federal Boiler Inspection Act or under the Federal Safety Appliance Act and has remanded the cause, in effect for retrial solely on the question of damages, depriving the relator of the benefit of the Federal Safety Statutes which entitled him to recover full damages if violation of either or both of these acts contributed in any degree to cause his injuries, without any reduction of damages on account of any contributory negligence on his part.

The questions involved in the decisions of the Appellate Court are of great importance to all the railroad employees who engage in interstate commerce and to all common carriers by railroad engaged in such commerce, as well as to the public at large who are entitled to the benefit and protection of the Federal Safety Statutes involved in Appellate Court decisions.

The relator will suffer irreparable damage and injury unless the judgment of the Appellate Court be corrected by this Honorable Court at this time, and the opinion of the Appellate Court discloses on its face that it is grossly erroneous, transcending the lawful powers of the Appellate Court, and is plainly contrary to the decisions of this Court and of the United States Supreme Court hereafter discussed.

PROPOSITIONS OF LAW RELIED UPON.

I.

This Court has power to order the judgment of the Appellate Court expunged and the judgment of the Superior Court of Cook County affirmed by Writ of Mandamus.

People ex rel. O'Connor v. *Haas,* 239 Ill. 320.
Brown v. *Western Railway of Alabama,* 70 S. Ct. 105.
People v. *Graber,* 394 Ill. 362.
People v. *Keeney,* 399 Ill. 611.
People v. *Graber,* 397 Ill. 522.
Armstrong v. *Obucino,* 300 Ill. 140.

II.

The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Boiler Inspection Act.

Federal Boiler Inspection Act, 45 U.S.C. §23.
Tiller v. *Atlantic Coast Line Railroad,* 323 U.S. 574.
Southern Pacific Co. v. *Lunsford,* 297 U.S. 398.
Hines v. *Smith,* 275 Fed. 766.
Williams v. *New York Central R. Co.,* 402 Ill. 494.
Urie v. *Thompson,* 69 S. Ct. 1018.
Lilly v. *Grand Trunk Western Railroad Co.,* 317 U.S. 481.
Louisville & N. R. Co. v. *Botts,* 173 F. (2d) 164.
Auschwitz v. *Wabash Railroad Co.,* 346 Ill. 190.
Bolan v. *Lehigh Valley Railroad,* 167 F. (2d) 939.
Mahutga v. *M. St. P. & S. S. Ry. Co.,* 182 Minn. 262.
A. T. & S. F. Ry. Co. v. *Scarlett,* 300 U.S. 471.

III.

The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Safety Appliance Act.

Federal Safety Appliance Act, 45 U.S.C. §11.

Allen v. *United States Fidelity & Guaranty Co.*, 269 Ill. 234.

Peters v. *General Rug & Carpet Cleaners*, 333 Ill. App. 47.

Kluska v. *City of Chicago*, 97 Ill. App. 665.

Lavender v. *Kurn*, 327 U.S. 645.

Williams v. *New York Central R. Co.*, 402 Ill. 494.

Cusson v. *Canadian Pacific Ry. Co.*, 115 F. (2d) 430.

Myers v. *Reading Co.*, 331 U.S. 477.

Didinger v. *Pennsylvania R. Co.*, 39 F. (2d) 798.

Philadelphia & R. R. Co. v. *Auchenbach*, 16 F. (2d) 550.

Spotts v. *Baltimore & Ohio R. Co.*, 102 F. (2d) 160.

Detroit T. & I. R. Co. v. *Hahn*, 47 F. (2d) 59.

Anderson v. *Baltimore & O. R. Co.*, 89 F. (2d) 629, Cert. denied, 302 U.S. 696.

Eker v. *Pettibone*, 111 F. (2d) 451.

Anderson v. *Chesapeake & O. R. Co.*, 352 Ill. 561.

Brown v. *Western Railway of Alabama*, 70 S. Ct. 105.

IV.

The relator is irreparably prejudiced and damaged by the decision of the Appellate Court.

Federal Employers' Liability Act, 45 U. S. C. A. Sec. 53.

V.

The relator has been wrongfully deprived of his right to a trial by jury guaranteed to him by the 7th Amendment of the Constitution of the United States and Article II, Sec. 5 of the Constitution of the State of Illinois, and has been denied equal protection of the law in contravention of the 14th Amendment of the United States Constitution and subjected to a judicial wrong in violation of Art. II, Sec. 19 of the Constitution of the State of Illinois.

United States Constitution, 7th and 14th Amendments.

Illinois Constitution, Art. II, Secs. 5 and 19.

Williams v. *New York Central R. Co.*, 402 Ill. 494.

Minn. & St. P. R. R. Co. v. *Bombolis*, 141 U.S. 211.

Wilkinson v. *McCarthy*, 336 U.S. 1.

Bailey v. *Central Vermont Ry.*, 319 U.S. 350.

Brady v. *Southern Ry. Co.*, 310 U.S. 476.

Brown v. *Western Railway of Alabama*, 70 S. Ct. 105.

Urie v. *Thompson*, 69 S. Ct. 1018.

ARGUMENT.

I.

The Court has power to order the judgment of the Appellate Court expunged and the judgment of the Superior Court affirmed by Writ of Mandamus.

This application conforms to the practice prescribed by this Court in *People ex rel. O'Connor* v. *Haas,* 239 Ill. 320.

The relator, as stated, is here seeking to enforce federally created rights which must be determined in accordance with the federal decisional law and must be uniformly determined and adjudicated in all courts, state and federal, as was held in the recent case of *Brown* v. *Western Railway of Alabama* (not yet officially reported, handed down Nov. 21, 1949, the same day the opinion of the Appellate Court in the subject action was filed) 70 S. Ct. 105.

Should this Honorable Court reach the conclusion that the judgment of the Appellate Court is not a final judgment or order from which an appeal may be taken to this Court, and is not subject to review by Writ of Error which the relator is contemporaneously suing out of this Court to review said judgment, we respectfully submit that this Court can and should expunge the judgment of said Appellate Court by Writ of Mandamus, upon the ground that said judgment as appears from the opinion of the Appellate Court is capricious and void and clearly contrary to the Federal Decisional Law governing and controlling the relator's federally created rights under the Federal Boiler Inspection and Federal Safety Appliance Acts (45

U.S.C. Secs. 11 and 23) and deprives the relator of his right to a jury trial and to the jury's proper determination of the issues guaranteed to the relator by the Seventh Amendment of the Constitution of the United States and Article 2, Section 5 of the Constitution of the State of Illinois, and denies the relator's equal protection of the law and contravention of the Fourteenth Amendment of the Constitution of the United States and subjects the relator to a judicial wrong for which relator has no remedy in violation of Article II, Section 19 of the Constitution of the State of Illinois.

In *People* v. *Graber,* 394 Ill. 362, this Honorable Court granted a Writ of Mandamus to expunge an interlocutory order of the Superior Court of Cook County involving federally created rights because the plaintiff could not appeal from the interlocutory order which this Court held to be void. Similarly in *People* v. *Keeney,* 399 Ill. 611, this Honorable Court granted mandamus to expunge an interlocutory order involving federally created rights. Likewise in *People* v. *Graber,* 397 Ill. 522, this Honorable Court granted mandamus to expunge void interlocutory orders requiring a non-resident plaintiff to appear in the City of Chicago for pre-trial deposition and staying prosecution of the action until he did appear and submit to examination.

In *Armstrong* v. *Obucino,* 300 Ill. 140, this Court said:

> "The statement has very frequently been made that where a court has jurisdiction of the parties and subject matter, its decree, however, erroneous, can only be attacked on appeal or error; but the rule is subject to an exception equally well settled,—that a decree may be void because the court has exceeded its jurisdiction. * * * Courts are limited in the extent and character of their judgments, and if they transcend their lawful powers their judgments and de-

crees are void and may be collaterally impeached wherever rights claimed under them are brought in question. The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment or decree, however, erroneous, cannot be collaterally assailed, is only correct when the court proceeds according to the established modes governing the class to which the case belongs and does not transcend in the extent and character of its judgment or decree the law or statute which is applicable to it."

We submit that the Appellate Court in the action in which the relator was plaintiff transcended its lawful powers and that its judgment reversing the judgment of the Superior Court of Cook County is void and should be expunged and that the judgment of the Superior Court of Cook County should be reinstated and affirmed.

II.

The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Boiler Inspection Act.

The Federal Boiler Inspection Act (45 U. S. C. Sec. 23) provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The tender of the locomotive involved in the subject action was equipped by the defendant with a rear light permanently affixed to the tender and forming a permanent and integral part of it. Therefore, the rear light became and was a part and an appurtenance of the locomotive, physically in fact and in legal contemplation. *Tiller* v. *Atlantic Coast Line Railroad,* 323 U. S. 574; *Southern Pacific Co.* v. *Lunsford,* 297 U. S. 398; *Hines* v. *Smith,* 275 Fed. 766.

The opinion of the Appellate Court stated:

> "In support of his action under the Boiler Inspection Act plaintiff testified that the light on the rear of the tender was out of focus, throwing its ray up instead of down toward the track. Members of plaintiff's crew contradict this testimony, and an issue of fact to be determined by the jury was created if this alleged defect in the light can be made the basis of an action under the Boiler Inspection Act."

However, the Appellate Court held that since the Interstate Commerce Commission rules with reference to rear or back-up lights on tenders did not require any light on the tender in question at the precise time of relator's injuries because the locomotive was then being used in road service, no violation of the Federal Boiler Inspection Act could be predicated on the condition of the light.

The Interstate Commerce Commission rules, and its right or authority to promulgate rules, are purely ancillary to and in aid of the Federal Boiler Inspection Act and do not supplant its positive and basic command. The Appellate Court erroneously held, however, that it was necessary for the Interstate Commerce Commission to promulgate a rule, covering the precise movement or *use* of the locomotive and the particular and exact situation at the moment of injury, before any right of recovery can be predicated on a defective appurtenance, which is

out of order and not in proper condition. In other words, it held in effect, that **a bad light was better than no light**, and since no light was required by the rules of the I.C.C., and the bad light did not "create" an additional peril, no violation of the Boiler Inspection Act can be based on the condition of the light. Therefore, the Appellate Court erroneously deprived relator of any right to recover under the Federal Boiler Inspection Act, itself.

The Appellate Court's opinion stated:

> "Defendant being under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the act, was not properly focused. No claim can be made that the projection of the rays of this light into the air created an 'unnecessary peril to life or limb' in the operation of the engine."

Relator submits that this ruling is clearly contrary to the provisions of the Federal Boiler Inspection Act and to all of the decisions of the United States Supreme Court bearing on the subject, to which this Court, in *Williams* v. *New York Central R. Co.*, 402 Ill. 494, has wholeheartedly subscribed. The ruling finds no support in any authoritative or persuasive decision of any court in the nation, state or federal.

The decision of the Appellate Court in failing to recognize the fundamental requirement of the Boiler Inspection Act has denuded this Act of its primary, positive, clear command, namely: forbidding the use of any locomotive, boiler, or tender, and all parts and appurtenances thereof, which are not in proper condition and safe to operate in the service to which they are put without unnecessary peril to life or limb. Under this statute it was the defendant's duty to provide a safe locomotive and tender

and all parts and appurtenances of both, irrespective of the rules of the Interstate Commerce Commission. The rear light on the tender was a part and appurtenance of the locomotive and tender; and it was for the jury, and not for the Appellate Court, to determine whether or not unnecessary peril contributing to relator's injuries were caused or created or was not avoided by the improper condition of the light. The Appellate Court seeks to substitute the rules of the Interstate Commerce Commission for the positive command of the Boiler Inspection Act. The Boiler Inspection Act is the basic, prime and dominant command from which arises the right of recovery for any defect of any part or appurtenance of a locomotive or tender, irrespective of the minimum requirements under any rules promulgated by the Interstate Commerce Commission.

No ruling or regulation by the Interstate Commerce Commission is necessary to bring within the scope or command of the statute a rear light which was in fact installed by the defendant on the tender as a permanent, integral and essential part thereof, and the fact that the Interstate Commerce Commission has promulgated rules regarding rear lights **does not exempt from the statute a light or any other part or safety device which is actually and in fact a part or appurtenance of a locomotive or tender.**

In *Tiller* v. *Atlantic Coast Line Railroad Co.,* 323 U. S. 574, the locomotive was ordinarily used in road service and did not have any rear light. It was pushing a string of cars which would have obscured the light if there had been one. Holding that the Trial Court was correct in permitting recovery for violation of the Boiler Inspection Act, the Supreme Court said:

> "It was for the jury to determine whether the failure to provide this required light on the rear of the

locomotive proximately contributed to the deceased's death.

* * *

"Assuming, without deciding, that the railroad could consistently with Rule 137 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light did not contribute to Tiller's death. The deceased met his death on a dark night, and the diffused rays of a strong headlight, even though directly obscured from the front, might easily have spread themselves so that one standing within three car lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 33, 64 S. Ct. 409. And 'The standard of care must be commensurate to the dangers of the business.' *Tiller* v. *Atlantic Coast Line Railroad, supra*, 318 U.S. at page 67, 63 S. Ct. at page 451, 87 L. Ed. 610, 143 A.L.R. 967."

In the subject action the backward movement of the engine was potentially perilous to the relator, who was required to ride through a dark, unlit railroad yard on the stirrup at the side of the tender with an inefficient headlight. If the headlight were properly focused, so that its rays of light shone along the ground instead of up into the sky, the relator's life and limb would not have been unnecessarily jeopardized. The position of the coal car fouling the main track would have been seen in time to avoid injury. The opinion of the Appellate Court deprives the relator for all time from any recovery under the Federal Boiler Inspection Act. To permit such a final decision to remain the law of the case at bar would be a travesty and a mockery of justice both as against your

relator and as against the very purpose of the Congressional Act for the protection of railroad employees.

In *Urie* v. *Thompson* (decided May 31, 1949) 69 S. Ct. 1018, an action to recover damages for silicosis, it was contended, and the Supreme Court agreed, that the Rule of the I.C.C. relating to sanders was not intended as a protection against silicosis, but was intended merely to afford additional braking power, and under the "conventional tort doctrine" would not impose absolute liability. Holding that the Boiler Inspection Act itself, irrespective of the purpose of the rule, provided the right of recovery, the Supreme Court said:

> "* * * we think the liability imposed by the Boiler Inspection Act is of broader character and that the correct rule is the one laid down in *Louisville & N. R. Co.*, v. *Layton*, 243 U. S. 617, 621, which this Court has had repeated occasion to apply in connection with the Safety Appliance Acts: 'The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever failure to obey these Safety Appliance Laws is a proximate cause of injury to them when engaged in the discharge of duty'."

Here again the United States Supreme Court calls attention to the fact that the Boiler Inspection Act provides the basis of the rights for recovery by railroad employees who are injured as a result of unnecessary peril arising from the use of a locomotive which a jury was warranted in finding was not in proper condition and safe to operate in the service to which it was put, even though the rule of the I.C.C. was not intended as protection from silicosis.

In *Lilly* v. *Grand Trunk Western Railroad Co.*, 317 U. S. 481, 63 S. Ct. 347, the Supreme Court, held with respect to a rule of the Interstate Commerce Commission which was not called to the attention of the trial court, namely, a rule requiring the "Top of the tender behind the fuel space be kept clean, and means provided to carry off waste water", that the presence of ice on the top of the tender involved unnecessary peril to life and limb, and that the jury was justified in finding that the presence of ice constituted a violation of the Boiler Inspection Act even in the absence of such a rule. The Court said:

> "* * * Negligence is not the basis for liability under the Act. Instead it 'imposes upon the carrier an absolute and continuing duty to maintain the locomotive and all parts and appurtenances thereof, in proper condition, and safe to operate * * * without unnecessary peril to life or limb.' (Citing cases) Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act. (Citing cases).
>
> "The Act, like the Safety Appliance Act, 45 U.S.C.A. Sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. (Citing cases).
>
> "The use of a tender, upon whose top an employee must go, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated. * * *
>
> "Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. * * * The failure of petitioner's counsel to

call Rule 153 to the attention of the trial court should no more deprive petitioner of its benefits than the failure to plead specifically the Federal Employers' Liability Act foreclosed the application of that Act on appeal to test the correctness of the trial judge's refusal to charge in *Grand Trunk Western Railroad Co.*, v. *Lindsay*, 233 U. S. 42, especially when, as here, *the rule only fortifies a result the jury could probably have reached even in the absence of such a rule.*" (Emphasis ours)

In that case, although the railroad company did not place the ice on the tender nor was there any defect of any part or appurtenance causing it to be there, but it came about from the unavoidable and uncontrollable operation of the natural elements, the presence of ice, irrespective of the effect of any rule of the Interstate Commerce Commission was definitely determined to authorize the jury to find a violation of the Boiler Inspection Act.

By the same token, a headlight which is out of order as the jury concededly was justified in finding with respect to the light in the subject action, constitutes a violation of the Boiler Inspection Act, irrespective of any rule which the Interstate Commerce Commission had made or might make.

The decisional law of the United States Supreme Court on all phases of the federally created rights for redress for injuries sustained by interstate railroad employees is controlling on and must be applied by all courts, state and federal. And the United States Supreme Court uniformly has held that when a railroad company installs, constructs and maintains on and as an integral part of a locomotive or tender any appurtenance, liability for proper maintenance of the appurtenance in an efficient manner is obligatory on the railroad company, by virtue of the

provisions of the Boiler Inspection Act itself, irrespective of any order, actual or potential, of the Interstate Commerce Commission.

In *Hines* v. *Smith,* 275 Fed. 766, the Circuit Court of Appeals for the Seventh Circuit affirmed a plaintiff's judgment which depended on the applicability of the Boiler Inspection Act to the defective condition of an automatic bell ringer which was not prescribed or regulated by any rule promulgated by the Interstate Commerce Commission, saying:

> "It is claimed on behalf of the plaintiff, and evidence supports the contention, that the automatic bell ringer was out of order and would not ring on the night of the accident, and that it had been out of order for some time. In answer thereto, defendant asserts that this act does not apply to bell ringers, and that the declaration does not charge a violation thereof. With neither position can we agree. The amendment of 1915 (extending the provisions of the Boiler Inspection Act to all parts and appurtenances of the locomotive, whereas formerly the Act had applied only to the boiler) we think, leaves no room for doubt. Certainly a bell ringer is a 'part' or an 'appurtenance' of a 'locomotive and tender'. While a liberal construction of this statute is not necessary to justify this conclusion, it is evident that the amendment should be liberally construed and its obvious purpose effectuated."

On March 14, 1949, the United States Court of Appeals for the Eighth Circuit, in *Louisville & N. R. Co.* v. *Botts,* 173 F. (2d) 164, correctly analyzed the Boiler Inspection Act in relation to orders of the Interstate Commerce Commission, namely, holding that the Act imposes three coordinate, and not simply coincident, conditions for the lawful use of a locomotive:

> "(1) All parts of the locomotive must be safe to operate without unnecessary peril to life or limb;

(2) the locomotive must have been submitted to the inspection provided for in the Act; and (3) the locomotive and its parts must meet such tests and conform to such standards as the Interstate Commerce Commission may have prescribed or approved."

"These on their face are coordinate conditions and commands, and the clauses therefore are not simply coincident. Thus, under the third clause, the Interstate Commerce Commission could hardly practicably be expected to lay down specifications of every individual item or element involved in the construction of the locomotive and its parts, but plainly Congress did not intend that any such non-prescription by the Commission should operate to relieve a carrier of its absolute obligation under the first clause, not to use any locomotive that is unsafe to operate, without unnecessary peril to life or limb, in the service to which it is put. The mere fact therefore that the third clause of the section of the statute has not been violated does not permit of a judicial ruling that there consequently in the present situation has been no violation of the first clause."

There is no longer any question in this State but that the federal decisional law must be applied to cases arising under the Federal Employers' Liability Act, supplemented by the Federal Boiler Inspection Act and the Federal Safety Appliance Act.

This Court in *Williams* v. *New York Central R. Co.*, 402 Ill. 494, 84 N.E. (2d) 399, has recently given firm adherence to the pronouncements and trend of the more recent decision of the United States Supreme Court, saying:

"In actions under the Federal Employers' Liability Act the rule for measuring the sufficiency and amount of evidence necessary to justify the submission of the case to the jury is that established by the Supreme Court of the United States, *Ellis* v. *Union Pacific Railroad Co.*, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572;

Brady v. *Southern Railway Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239, and it is clear from its recent decisions that the authority of courts to withdraw from the consideration of a jury the question of a defendant railroad company's negligence and its proximate relation to the injury is now very restricted indeed. (Citing cases).

* * *

'The right to trial by jury is a part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act. *Bailey* v. *Central Vermont Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. *Blair* v. *Baltimore & Ohio Railroad Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; *Bailey* v. *Central Vermont Railroad Co.* 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.' "

The relator submits that the Appellate Court's reliance on the decision in *Auschwitz* v. *Wabash Railroad Co.*, 346 Ill. 190, decided in 1931 before the 1939 amendments of the Federal Employers' Liability Act and the current unmistakable trend of the decisions of the United States Supreme Court in relation to these railroad cases, is untenable. The United States Court of Appeals for the 2nd Circuit in *Bolan* v. *Lehigh Valley Railroad Co.* (May 10, 1948) 167 F. 2d 939, on almost identical facts as those involved in the *Auschwitz* case, said:

"Accordingly, if an appurtenance conforms with the I.C.C. regulations but nevertheless violates the Act, the latter must control."

We submit that the cases of *Mahutga* v. *M. St. P. & S. S. M. Ry. Co.*, 182 Minn. 262, and *A. T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471, are clearly distinguishable from the situation in the case at bar.

In the *Mahutga* case, the plaintiff claimed a violation of the Boiler Inspection Act because the railroad company did not provide some means of fastening the cab curtain back, although no such requirement was contained in the order of the Interstate Commerce Commission prescribing in detail the requirements with respect to such curtains. The curtains, in fact, conformed strictly to the requirements of the Interstate Commerce Commission. It was not claimed, as it is in the case at bar, that there was anything out or order, defective or not properly functioning with respect to the appurtenance.

In the *Scarlett* case, the claim was that a ladder on a box car, which was not defective and which complied with the regulations of Interstate Commerce Commission, violated the Boiler Inspection Act because round brace rods on the side of the car which formed no part of the ladder itself rendered the use of the ladder dangerous despite the fact that the ladder cleared the brace rod more than the minimum distance required by the order of the Interstate Commerce Commission for such clearance.

In the subject action, unlike those cases, there is, as the Appellate Court has said: "An issue of fact to be determined by the jury * * * if * * * (the) defect in the light can be made the basis of an action under the Boiler Inspection Act".

Contrary to the statement in the opinion of the Appellate Court that

> "No claim can be made that the projection of the rays of this light into the air created 'unnecessary peril to life or limb' in the operation of the engine,"

the United States Supreme Court in *Tiller* v. *Atlantic Coast Line Railroad Co.*, 323 U. S. 574, said:

> "The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard."

The Appellate Court's statement that the defective light could not be held to "create" an unnecessary peril to life or limb evidences a misapprehension with respect to the requirements of the Boiler Inspection Act. It is not necessary for a defective appliance to "create" an additional hazard, but it is required that all parts and appurtenances of a locomotive should be in such condition as to avoid unnecessary perils.

It cannot be reasonably contended that a light, affixed to the tender which was in such a condition that its light was thrown upward into the air instead of along the tracks as it was intended to be by the fixed focused method of application, entailed no unnecessary hazard and peril, or that such unnecessary hazard and peril would not have been avoided if the light had shone straight back along the tracks. If it had been in proper working order, it would have disclosed the close proximity of the coal car to the main track long before the situation was or could have been observed by the relator or by the engineer. The violation of the Federal Boiler Inspection Act contributed to cause the relator's injuries.

As was said in *Southern Pacific Ry. Co.* v. *Lunsford,* 297 U. S. 398, and as was held in *Lilly* v. *Grand Trunk Railroad Co.,* 317 U. S. 481, and *Hines* v. *Smith,* 275 Fed. 766, a defective part or appurtenance of a locomotive if actually a permanent and integral part thereof, which by reason of the defect fails to avoid unnecessary peril constitutes a violation of the Boiler Inspection Act, whether or not the part or appurtenance is required or covered by any order of the Interstate Commerce Commission.

The railroad company, knowing the service to which the locomotive was to be put, equipped it with a rear light with a fixed focus, the only purpose of which could have been to provide for safety when the locomotive

was backing in the night season, as the locomotive in the subject action was doing when relator was injured. If it were out of order, entailing unnecessary peril which would have been avoided by having the light in proper condition, the jury was warranted in finding that the Boiler Inspection Act was violated, and that such violation contributed to cause relator's injuries.

The Appellate Court's opinion finally determines the issues in this regard, and erroneously denies and deprives your relator of protection under the Federal Boiler Inspection Act.

III.

The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Safety Appliance Act.

The Safety Appliance Act provides: (45 U.S.C. Sec. 11)

> "It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

Defendant's counsel, in opening defendant's case to the Court and jury at the outset of the trial, stated among other things partially set forth in the opinion of the Appellate Court:

> "Now I notice what Mr. Fuerst said about how the car got there. I do not know if it was put there or whether it had drifted there. In other words, if the brakes were defective in holding the car."

That statement is a plain and unequivocal admission that the Clifford siding sloped down toward the O. P. Main

and was a plain statement that the defendant did not contest the fact that the brake on the coal car was defective and inefficient. The statement was never withdrawn or modified up until the time the case was submitted to the jury, and represents the theory upon which the defense was based and is binding on the defendant. *Allen* v. *United States Fidelity & Guaranty Co.*, 269 Ill. 234; *Peters* v. *General Rug & Carpet Cleaners*, 333 Ill. App. 47; *Kluska* v. *City of Chicago*, 97 Ill. App. 665.

The opinion of the Appellate Court states:

> "The testimony relating to the brakes on the coal car is limited to plaintiff's statement that on going to work around 9:15 to 9:20 P. M. he saw a coal car on the spur track about 10 feet from the switch and that a regular brakeman was setting the brake * * * and that several hours later the car was so near the main track as to interfere with the operation of engines and cars on it."

It is apparent from the opinion that the above quoted statement is not literally accurate, and that there was additional evidence that the coal car drifted, due to inefficiency of the brake, from its safe place 10 feet in on the spur to the place it occupied fouling the main track when plaintiff was crushed between it and the tender in the darkness of midnight.

It is true that the testimony relating to the brakes on the coal car is limited as stated in the opinion and as is apparent from the further discussion of the subject in the opinion.

Defendant did not offer any evidence of any character to rebut relator's testimony that the brake was inefficient. It did not call the brakeman who put the coal car on the siding and applied the brake. It did not call anybody who

had anything to do with moving the coal car after the accident, and it passes credulity to think that respondent left it in the position fouling the O. P. Main after it had caused injuries to one of its employees. It did not produce any profile map made on actual survey, as it certainly would have done if there were any honest question about whether the coal car drifted to its dangerous position or if there were any honest question as to its direction of the grade of the tracks.

If there was any legitimate issue as to direction of the slope or the inefficiency of the brake on the coal car, all questions relating to such issue were questions of fact for the jury which the Appellate Court cannot redetermine contrary to the determination of the jury in this case, which is governed by the Federal Employers' Liability Act and the Safety Appliance Act.

Lavender v. *Kurn,* 327 U. S. 645.
Williams v. *New York Central R. Co.,* 402 Ill. 494.
Cusson v. *Canadian Pacific Ry. Co.,* 115 F. 2d 430.

In *Lavender* v. *Kurn,* 327 U. S. 645, it was said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The evidence offered by relator with respect to the inefficiency of the hand brake, that is, its failure to function and to keep the coal car from drifting, is substantial evidence and was sufficient to make the issue one for the jury within the decision of the United States Supreme Court in *Myers* v. *Reading Co.*, 331 U. S. 477; *Didinger* v. *Pennsylvania R. Co.*, 39 F. 2d 798 and *Philadelphia & R. R. Co.* v. *Auchenbach*, 16 F. 2d 550, that the hand brake on the coal car was inefficient.

To the same effect:

Spotts v. *Baltimore & Ohio R. Co.*, 102 F. 2d 160.
Detroit T. & I. R. Co. v. *Hahn*, 47 F. 2d 59.
Anderson v. *Baltimore & O. R. Co.*, 89 F. 629, Cert. denied, 302 U. S. 696.
Eker v. *Pettibone*, 111 F. 2d 451.
Anderson v. *Chesapeake & O. R. Co.*, 352 Ill. 561.

The Appellate Court, in stating:

> "No inference of inefficiency of the brake can be drawn from the mere fact that plaintiff saw a switchman setting the brake—an incomplete operation—* * * It must first be shown that the brake was actually set, with due care and in the normal, natural and usual manner."

overlooked the wholly permissible and natural inference which the jury should be permitted to draw, namely, that a regular yard brakeman of defendant setting a brake would do so with due care and in the normal, natural and usual manner. This under these Federal Acts was within the province of the jury, and not within the province of the Appellate Court. Furthermore, the erroneous and gratuitous assumption by the Appellate Court in the use of the phrase "incomplete operation" is not borne out by the record. It only takes a fraction of a minute to set a brake. In railroad parlance, the relator's testimony that

he saw a regular yard brakeman setting the brake means that he saw the brake applied in a proper manner,—a complete operation, which twelve jurors believed to be the fact.

As this Court said in *Williams* v. *New York Central R. Co.*, 402 Ill. 494:

> "In actions under the Federal Employers' Liability Act the rule for measuring the sufficiency and amount of evidence necessary to justify the submission of the case to the jury is that established by the Supreme Court of the United States, * * * and it is clear from its recent decisions that the authority of courts to withdraw from the consideration of a jury the question of a defendant railroad company's negligence and its proximate relation to the injury is now very restricted indeed."

Again in *Brown* v. *Western Railway of Alabama*, 70 S. Ct. 105, (not yet officially reported) where the state court had sustained a demurrer to a complaint in conformity with the local rules governing pleadings, the United States Supreme Court said:

> "Strict local rules of pleadings cannot be used to impose unnecessary burden upon rights of recovery authorized by federal laws. Whatever springs the State may set for those endeavoring to assert rights the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. *Davis* v. *Weschler, supra* (263 US 22) at 24. Cf. *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197. Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved. *Lee Brady* v. *Southern R. Co.*, 320 U. S. 476, 479."

The principles, which this Court in the *Williams* case, *supra*, has said must govern in F. E. L. A. cases, and its

instructions to the lower courts of this State in that regard, have been ignored and violated by the Appellate Court in the case at bar. To require the relator to retry his case without the protection of the Safety Appliance Act, which the evidence clearly justified and which the Trial Court properly accorded him, not only destroys his rights under verdict and judgment correctly returned and rendered in conformity with the Act, but also deprives him of the protection Congress provided interstate railroad workers in the Federal Employers' Liability and the Safety Appliance Acts and guaranteed to him by the Constitution of the United States and of the State of Illinois.

It would be a travesty on justice for this Court to fail to follow the cardinal principle of law, embodied in Article II, Sec. 19 of the Constitution of this State, that for every wrong there shall be a remedy, and to fail or refuse, because of any supposed procedural difficulties, to expunge or otherwise correct the judgment of the Appellate Court.

IV.

The relator is irreparably prejudiced and damaged by the decision of the Appellate Court.

The only question on any new trial of this action under the opinion of the Appellate Court will be the amount of the damages to be awarded to relator by another jury. In view of defendant's admission of its liability under the Federal Employers' Liability Act, a recovery of damages by the relator in some amount is certain, inasmuch as any negligence on the part of relator which the new jury might find contributed to cause relator's injuries would not bar, but would merely diminish, the amount of his recovery.

If the evidence on the new trial with respect to defendant's violation of the Federal Boiler Inspection and Fed-

eral Safety Appliance Acts be the same as it was on the first trial, relator will be denied the benefits of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 53, to the effect that he shall not

> "* * * be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Apart from the delay in the ultimate determination of the amount of damages to which relator is entitled, the relator, by the decision of the Appellate Court, has been and will continue to be deprived of a jury determination on a new trial, of the issues involved in his assertion of federally created rights under the Federal Boiler Inspection and Safety Appliance Act, that were properly determined by the jury and the Trial Court on the first trial in complete accord with the federal decisional law. On a new trial, the Trial Court would be bound to conform to the opinion of the Appellate Court, and if the evidence be the same, the relator would be deprived of his statutory rights provided for him by the Federal Safety Statutes, erroneously eliminated from this case by the Appellate Court. Any appeal by relator which might lie from the judgment in his favor at the new trial, would have to be prosecuted beyond the Appellate Court to correct the errors now belaboring the case, and the only relief that could be granted would be to order a third trial in order to restore to the relator the benefit and protection of the Federal Safety Statutes in accord with the judgment he has properly obtained.

In other words, the decision of the Appellate Court to the effect that relator is not entitled to recover under the Boiler Inspection Act or the Safety Appliance Act is final, short of corrective action by this Court.

In these circumstances, we submit that it would be unconscionable to require relator to go through the empty gesture of a new trial, particularly since the relator has already lost over $10,000 in wages as a result of the injuries wrongfully inflicted on him by the defendant, with its attendant delay and expense, when this Court can now correct the situation, and conscientious observance of the law requires this Court to do so now.

V.

The relator has been wrongfully deprived of his right to a trial by jury guaranteed to him by the 7th Amendment of the Constitution of the United States and Article II, Sec. 5 of the Constitution of the State of Illinois, and has been denied equal protection of the law in contravention of the 14th Amendment of the United States Constitution and subjected to a judicial wrong in violation of Article II, Sec. 19 of the Constitution of the State of Illinois.

Relator asserts and claims that he has been denied the right to trial by jury of the factual issues relative to his right to recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act, in violation of the provisions of the 7th Amendment of the Constitution of the United States and Article II, Sec. 5 of the Constitution of the State of Illinois, and that he has been denied equal protection of the law by the decision of the Appellate Court in violation of the provision of the 14th Amendment of the Constitution of the United States.

Relator further asserts and claims that the decision of the Appellate Court has visited upon him a wrong for which there is no remedy except by review and reversal by this Court, and violates the provisions of Article II, Sec. 19 of the Constitution of the State of Illinois.

Relator asserted and claimed his constitutional rights at the first opportunity, namely, in his motion in the

Appellate Court for a rehearing and for leave to appeal to this Court (Add. Abst. from App. Ct. 273-300). Relator's constitutional rights as above set forth were infringed and violated for the first time when the Appellate Court made and filed its decision on defendant's appeal from the judgment in relator's favor. Relator duly demanded (Abst. 1) and was properly accorded a trial by jury in the Superior Court of Cook County, and the factual issues with respect to his right to recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act were properly tried and submitted to the jury in the Superior Court of Cook County. It was not until the Appellate Court handed down its decision to the effect that relator was not entitled to recover under either of these safety statutes that his constitutional rights were invaded. He promptly and clearly claimed his constitutional rights at the first opportunity in his motions in the Appellate Court for a rehearing and for leave to appeal, (Add. Abst. from App. Ct. 273-300) and such claims were necessarily passed on by the Appellate Court when it denied the motions.

The relator is here asserting federally created rights which, as this Court has held in *Williams* v. *N.Y.C. R.R. Co.,* 402 Ill. 494, are governed and must be determined according to the federal decisional law.

It is perhaps unnecessary in this Court to argue the question whether the law under the recent decisons of the United States Supreme Court has progressed with reference to the questions involved in the case at bar to the point which overrules or modifies the decision of the Supreme Court in *Minn. & S.P. R.R. Co.* v. *Bombolis,* 141 U.S. 211.

It is certain, however, as stated in Mr. Justice Douglas' concurring opinion in *Wilkinson* v. *McCarthy,* 336 U. S. 1,

that by the recent decisions of the United States Supreme Court.

> "The historic role of the jury in performing that function (whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected) * * * is being restored in this important class of cases."

As stated in *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence * * * It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act * * * The jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries' * * * To deprive these workers of the benefit of a jury trial in close but doubtful cases is to take away a good portion of the relief which Congress has afforded them."

In *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, it was said:

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. *Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states.* * * * It is true that this Court has held that a state need not provide in F.E.L.A. cases any trial by jury according to the requirements of the Seventh Amendment. * * * But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question." (Emphasis ours)

Again, with due apology for the repetition deemed justified to emphasize the inexorable resolution of the United States Supreme Court to enforce uniform and equal administration of the federally created rights of railroad employees, it said in *Brown* v. *Western Railway of Alabama*, 70 S. Ct. 105:

> "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' *Davis* v. *Weschler, supra,* 263 U.S. at page 24; Cf. *Maty* v. *Grasselli Chemical Co.,* 303 U.S. 197. Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, *desirable uniformity in adjudication of federally created rights could not be achieved.* See *Brady* v. *Southern R. Co.,* 320 U.S. 476, 479." (Emphasis ours)

The Appellate Court's opinion clearly demonstrates, and its decision constitutes, an invasion of relator's constitutional rights by repudiating, without any justification, the jury's fact-finding function in this case as to relator's right to recover under both safety statutes. Furthermore, in order to contravene and intercept the rights to a jury determination of the factual issues in that connection, and to the equal protection of the law, guaranteed to plaintiff by the Federal and State Constitutions, the Appellate Court ingeniously devised its own findings of fact contrary to those of the jury imported by its general verdict, and its own interpretation of the Boiler Inspection and Safety Appliance Acts, thereby completing its denial of plaintiff's constitutional rights.

It ignores the commands of the decisional law of the Supreme Court of the State and of the Nation, requiring uniform administration and equal protection of plaintiff's federally created rights.

It is now clear, from the language of the Court, and the actual decisions in the *Urie* and *Brown* cases, *supra,* that the twilight zone of distinction between substantive and procedural rights heretofore existing has been abolished; that the intent and purpose of the Congressional enactments in the Federal Employers' Liability Act, the Federal Boiler Inspection Act, and the Federal Safety Appliance Act, must be administered with equality and uniformity throughout the entire nation, whether the appeal for justice be to a Federal or to any State Court; and that all cases arising under these Federal Acts shall be determined as to substance, notwithstanding any local procedural law, in accordance with the federal decisional law.

In *Urie* v. *Thompson,* 69 S. Ct. 1018 it was said:

> "Whatever the effect of the state supreme court's ruling for further proceedings in the state courts, it could not impose such an alternative upon petitioner (waiving the right to a new trial). Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review."

As we have before pointed out, the Appellate Court's decision to the effect that the relator cannot recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act is final and deprives the relator of the equal protection of the law and "desirable uniformity in adjudication of federally created rights."

CONCLUSION.

It is submitted that in the situation in which the relator has been put by the decision of the Appellate Court, the only effective remedy open to him is by review and reversal or expunging of the Appellate Court's decision at this stage of the proceedings, and that any obstacle of a technical or procedural nature should not deter this Honorable Court in reviewing that decision. To all intents and purposes it is final as to relator's right to recover under the Federal Safety Statutes. It is grossly and indefensibly wrong for which the relator has no remedy except in the hands of this Court. This Court in the conscientious performance of its duty, and in the interest of justice and in conformity with the emphatic teachings of the United States Supreme Court in its recent decisions, should accept jurisdiction and correct the erroneous judgment of the Appellate Court and restore his constitutional rights to this plaintiff.

Respectfully submitted,

HARRY G. FUERST,
SCHWARTZBERG & BARNETT,
Attorneys for Relator.

HARRY G. FUERST,
Of Counsel.

EXHIBIT A.

OPINION OF THE APPELLATE COURT

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $40,000 entered on a verdict in a personal injury action brought under the Federal Employers' Liability Act (45 U.S.C.A. secs. 51-59), Federal Safety Appliance Act (45 U.S.C.A. sec. 11), and, by amendment made during the trial, the Federal Boiler Inspection Act (45 U.S.C.A. sec. 23).

Plaintiff was injured in defendant's Fort Wayne, Indiana yard on November 14, 1946, at about 11:50 p.m. in the performance of his duties as a road brakeman, engaged with his crew, consisting of an engineer, fireman, conductor and another brakeman, in backing an engine and tender on a main track (O.P.Main) in order to couple to an interstate train made ready by yard switchmen for movement to Bellevue, Ohio by plaintiff's crew. The main track runs east and west and the engine was backing toward the west. A spur track came off the main track at an angle toward the south and west. Plaintiff was on a stirrup on the southwest corner of the tender. When close to the junction with the spur track he saw a coal car spotted near the main track and attempted to get around the corner of the tender to a wheel on the back. He was brushed off as the tender passed the coal car and sustained injuries for which he brought suit. Defendant admits its liability under the Federal Employers' Liability Act in failing to provide the plaintiff with a reasonably safe place in which to work and in failing to provide sufficient clearance between the spotted coal car and the moving engine and tender. It denies liability under the Safety Appliance

and Boiler Inspection acts. As defined by instructions to the jury given at plaintiff's request, defendant's liability under the first of the two acts last mentioned is based on its alleged failure to provide efficient hand brakes on the coal car, and under the second act upon its alleged failure to equip the rear of the tender with an efficient and properly focused light.

On appeal defendant's principal contentions are, that the court erred in giving instructions permitting recovery under the Safety Appliance and Boiler Inspection acts because there is no evidence of the violation of either, and, that the damages awarded are excessive.

The testimony relating to the brakes on the coal car is limited to plaintiff's statement that on going to work around 9:15 to 9:30 p. m. he saw a coal car on the spur track about 10 feet from the switch and that a regular yard brakeman was setting the brake. As stated in *Meyers* v. *Reading Co.,* 331 U. S. 477, cited by plaintiff, there are two recognized methods of showing the inefficiency of hand brake equipment—adducing evidence to establish some particular defect, or, showing a failure to function, when operated with due care, in the normal, natural and usual manner. Plaintiff makes no claim under the first method. The evidence fails utterly to meet the requirements of the second. The court takes judicial notice that a car on a sloping track will move downward unless an efficient hand brake is properly applied or set. No inference of inefficiency of the brake can be drawn from the mere fact that plaintiff saw a switchman setting the brake —an incomplete operation—when the car was 10 feet from the switch and that several hours later the car was so near the main track as to interfere with the operation of engines and cars on it. It must first be shown that the brake was actually set, with due care and in a normal,

natural and usual manner. It must also be shown that the slope of the spur track was such as to cause a spotted car to move or drift toward the main track unless an efficient brake was properly set. The burden of making this proof was upon plaintiff. As conceded upon oral argument, defendant is under no obligation to adduce any evidence until plaintiff has made a *prima facie* case. Plaintiff did not make the necessary proof. The only evidence as to a slope of the spur track is the testimony of three members of plaintiff's crew, who testified as follows: The conductor said the spur slopes to the west; the fireman that it slopes away from the main track, and the engineer that it is an incline to the west. An incline is a slope. (Century Dictionary.) The same authority defines slope, a verb, as "to bend down, direct obliquely, incline, slant," and slope, a noun, as "an oblique direction, obliquity, slant, especially a direction downward." Plaintiff used slope in the sense of a direction downward when he testified that a car on a slope would drift if the brake was defective. Drift of the coal car toward the main track was impossible under the uncontradicted evidence that the spur track sloped to the west and away from the main track. Plaintiff's counsel now claim that no proof was required because of admissions by defendant's counsel in his opening statement. The language relied upon is: "Now I notice what Mr. Fuerst said on how the car got there. I do not know if it was put there or whether it had drifted there. In other words, if the brakes were defective in holding the car." "I do not know" is not an admission of facts as to which counsel declares his lack of knowledge.

In support of his action under the Boiler Inspection act plaintiff testified that the light on the rear of the tender was out of focus, throwing its rays up instead of down toward the track. Members of plaintiff's crew contradict

this testimony, and an issue of fact to be determined by the jury was created if this alleged defect in the light can be made the basis of an action under the Boiler Inspection act. Under that act the Interstate Commerce Commission is empowered to make rules and regulations by which the fitness for service of a locomotive, its boiler, tender and all parts and appurtenances thereto shall be determined. *Napier* v. *Atlantic Coast Line R. Co.* 272 U. S. 605. These regulations have the force of law and are judicially noticed. *Lilly* v. *Grand Trunk Western R. Co.* 317 U. S. 481. Strict compliance with the rules and specifications of the commission is fulfillment of the carrier's duty. *Auschwitz* v. *Wabash Ry. Co.*, 346 Ill. 190; *Mahutga* v. *M. St. P. & S. S. M. Ry. Co.*, 182 Minn. 362; *A. T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471. Rule 129 (a) of the Interstate Commerce Commission prescribes specifications for the headlight on a locomotive used in road service. 129(b) is as follows: "Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear (a) headlight which shall meet the foregoing requirements." Rule 131 of the commission, relied upon by plaintiff, is limited to lights on locomotives used in yard service and it has no application to the present case because the movements of the engine on which plaintiff was riding were not in yard service. In an instruction approved by the Supreme Court in *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, movements of an engine in a yard to classify cars and make up a train were held to be in yard service. but movement of a road engine backing into a siding for the purpose of getting out of the way of the yard engine was not a movement in yard service. Here the interstate train to which the engine with which plaintiff was working was to

be attached had been made up by the yard crew. Plaintiff's engine was backing up to couple to the train and move it to Bellevue, Ohio. Its movements were within the exceptions stated in 129(b) *supra,* and no headlight was required. Defendant being under no obligation under the Boiler Inspection act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the act, was not properly focused. No claim can be made that the projection of the rays of this light into the air created an "unnecessary peril to life or limb" in the operation of the engine.

Giving the instructions permitting recovery under the Safety Appliance and Boiler Inspection acts requires a reversal of the judgment. Plaintiff's contributory negligence, if any, was a matter for the jury. Under the acts last mentioned it cannot be asserted as a defense or in mitigation of damages. It must be considered in reduction of damages under the Federal Employers' Liability Act. The damages awarded are large and it may be that the jury, relying on the instructions relating to the Safety Appliance and the Boiler Inspection acts, failed to consider the question of contributory negligence in making the award.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

TUOHY, *P. J.*, and FEINBERG, *J.* concur.

[fol. 31] And, on the same day, to-wit: the 31st day of December, A.D. 1949, there was filed in the Office of the Clerk of the Supreme Court certain suggestions and memorandum in support of petition for leave to file application for writ of mandamus, which are in the words and figures following, to-wit:

[fol. 32] [Stamp:] Filed Dec. 31, 1949, Earle Benjamin Searcy, Clerk.

IN THE SUPREME COURT OF ILLINOIS

No. 31427

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS, Petitioner

v.

JOHN M. TOUHY, Presiding Justice; GROVER C. NIEMEYER and Michael Feinberg, Justices; Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents

SUGGESTIONS AND MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO FILE APPLICATION FOR WRIT OF MANDAMUS

The relator is filing contemporaneously herewith a petition for leave to appeal from the judgment of the Appellate Court of Illinois for the First District reversing a judgment in favor of the relator for the sum of Forty Thousand Dollars ($40,000.00) entered in the Superior Court of Cook County on May 7, 1948, and after trial of the issues before the Honorable Wilbert F. Crowley and a jury in said Court in an action brought by the relator against The New York, Chicago & St. Louis Railroad Company, a corporation, and remanding said cause to the Superior Court of Cook County for further proceedings in conformity with the opinion of said Appellate Court.

The relator in and as a part of said petition for leave to appeal has briefed the questions involved and begs leave of this Honorable Court to refer to the suggestions and authorities contained in said petition for leave to appeal in support of this petition for leave to file an application for Writ of Mandamus.

Should this Honorable Court reach the conclusion that the judgment of the Appellate Court is not a final judgment or order from which an appeal may be taken to this Court, and is not subject to review by Writ of Error which the relator is contemporaneously suing out of this Court to review said judgment, we respectfully submit that this Court can and should expunge the judgment of said Appellate Court by Writ of Mandamus upon the ground [fol. 33] that said judgment as appears from the opinion of the Appellate Court is capricious and void and clearly contrary to the Federal Decisional Law governing and controlling the relator's federally created rights under the Federal Boiler Inspection and Federal Safety Appliance Acts (45 U.S.C. Secs. 11 and 23) and deprives the relator of his right to a jury trial and to the jury's proper determination of the issues guaranteed to the relator by the Seventh Amendment of the Constitution of the United States and Article 2, Section 5 of the Constitution of the State of Illinois, and denies the relator's equal protection of the law and contravention of the Fourteenth Amendment of the Constitution of the United States and subjects the relator to a judicial wrong for which relator has no remedy in violation of Article 2, Section 19 of the Constitution of the State of Illinois.

The relator is here asserting and endeavoring to enforce federally created rights which as this Court has held in *Williams* v. *New York Central R. Co.*, 402 Ill. 494, must be determined in accordance with Federal Decisional Law.

We respectfully submit that the questions involved in the decision of the Appellate Court are of great importance to all railroad employees who engage in interstate commerce and to all common carriers in such commerce, as well as to the public at large who may be entitled to the benefit and protection of the Federal Safety Statutes involved in the Appellate Court's decision.

We further respectfully submit that the relator will suffer irreparable damage and injury unless the judgment of the Appellate Court be corrected by this Honorable Court at this time, and that the opinion of the Appellate Court discloses on its face that it is erroneous and plainly contrary to the decisions of this Court and of the United States Supreme Court which we have discussed in the Petition for Leave to Appeal.

We respectfully submit that this Court has the power to order the judgment of the Appellate Court expunged and the judgment of the Superior Court of Cook County affirmed by Writ of Mandamus.

In *People* v. *Graber,* 394 Ill. 362, this Honorable Court granted a Writ of Mandamus to expunge a- interlocutory [fol. 34] order of the Superior Court of Cook County involving federally created rights because the plaintiff could not appeal from the interlocutory order which this Court held to be void. Similarly in *People* v. *Keeney,* 399 Ill. 611, this Honorable Court granted mandamus to expunge an interlocutory order involving federally created rights. Likewise in *People* v. *Graber,* 397 Ill. 522, this Honorable Court granted mandamus to expunge void interlocutory orders requiring a non-resident plaintiff to appear in the City of Chicago for pre-trial deposition and staying prosecution of the action until he did appear and submit to examination.

In *Armstrong* v. *Obucino,* 300 Ill. 140, this Court said:

> "The statement has very frequently been made that where a court has jurisdiction of the parties and subject matter, its decree, however erroneous, can only be attacked on appeal or error; but the rule is subject to an exception equally well settled,—that a decree may be void because the court has exceeded its jurisdiction. * * * Courts are limited in the extent and character of their judgments, and if they transcen*t* their lawful powers their judgments and decrees are void and may be collaterally impeached wherever rights claimed under them are brought in question. The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment or decree, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds according to the established modes governing the class to which the case belongs and does not transcend in the extent and character of its judgment or decree the law or statute which is applicable to it."

We submit that the Appellate Court in the action in which the relator was plaintiff transcended its lawful powers and that its judgment reversing the judgment of the Superior Court of Cook County is void and should be expunged and

that the judgment of the Superior Court of Cook County should be reinstated and affirmed.

Respectfully submitted, Harry G. Fuerst and Schwartzberg & Barnett, Attorneys for Petitioner, 77 West Washington Street, Chicago 2, Illinois.

[fol. 35] [Endorsed:] In the Supreme Court of Illinois. The People of the State of Illinois on Relation of William Edward Woods, Petitioner, v. John M. Touhy, Presiding Justice, Grover C. Niemeyer & Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District. Suggestions and Memorandum in Support of Petition for Leave to File Application for Writ of Mandamus. Harry G. Fuerst and Schwartzberg & Barnett, Attorneys and Counselors, 77 West Washington Street, Phone RAndolph 6-3555, Chicago 2.

[fol. 36] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of January in the year of our Lord, one thousand nine hundred and fifty, within and for the State of Illinois.

Present: Charles H. Thompson, Chief Justice; Justice Francis S. Wilson, Justice William J. Fulton, Justice Joseph E. Daily, Justice Walter T. Gunn, Justice Jesse L. Simpson, Justice Albert M. Crampton. Ivan A. Elliott, Attorney General. Harry G. Newman, Marshal. Attest: Earle Benjamin Searcy, Clerk.

Be It Remembered, that, to-wit: on the 10th day of January, A. D. 1950, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 31427

PEOPLE ex Rel. WILLIAM EDWARD WOODS, Petitioner,

vs.

JOHN M. TOUHY, Presiding Justice, GROVER C. NIEMEYER and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents

Mandamus

And now, on this day, the Court having duly considered the motion by petitioner for leave to file an original petition for writ of mandamus, and being now fully advised of and concerning the premises, doth deny the motion for leave to file an original petition for writ of mandamus.

[fol. 37] And afterwards, to-wit: on the 16th day of January, A. D. 1950, the same being one of the days of the Term of Court aforesaid, there was filed in the Office of the Clerk of the Supreme Court a certain motion by petitioner for reconsideration of the order denying motion for leave to file an original petition for writ of mandamus, which is in the words and figures following, to-wit:

[fol. 38] IN THE SUPREME COURT OF ILLINOIS

No. 31427

THE PEOPLE OF THE STATE OF ILLINOIS on Relation of WILLIAM EDWARD WOODS, Petitioner,

v.

JOHN M. TOUHY, Presiding Justice, GROVER C. NIEMEYER and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents

MOTION TO RE-CONSIDER ORDER DENYING MOTION FOR LEAVE TO FILE AN ORIGINAL PETITION FOR WRIT OF MANDAMUS

To the Honorable Justices of the Supreme Court of Illinois:

Your petitioner, The People of the State of Illinois on Relation of William Edward Woods, by his attorneys,

Joseph A. Londrigan, Harry G. Fuerst and Schwartzberg & Barnett, comes and respectfully moves this Honorable Court to re-consider its order of January 10, 1950, denying petitioner's motion for leave to file an original petition for writ of mandamus and in support of this motion submits the following suggestions.

1. If the decision of the Appellate Court is not a final order from which an appeal may be taken, then relator has no adequate remedy available, other than a writ of mandamus from this court. In the People v. Graber, 394 Ill., 362, commencing at the close of p. 368, this court stated:

"The existence of another and adequate remedy, while no bar to the relief, (People ex rel. Waber v. Wells, 255 Ill. 450,) may be of importance in determining whether we will assume jurisdiction in a particular case, and, in the exercise of the discretion vested in this court, might be considered as constituting good grounds for refusal to act. An order striking the name of an attorney and expelling him from appearing as counsel for a party litigant is not a final order from which an appeal may be taken. (People ex rel. School District Corp. 380 Ill. 524.) Neither the litigant, the attorney, nor the interests which the litigant or attorney represents can appeal from such order. Nor is there any adequate remedy available to them other [fol. 39] than the writ of *mandamus* from this court."

If this court does not correct the action of the Appellate Court then on a new trial, the Trial Court, would be bound to conform to the opinion of the Appellate Court, and if the evidence be the same, the relator would be deprived of his statutory rights provided for him by the Federal Safety Statutes, erroneously eliminated from this case by the Appellate Court. Any appeal by relator which might lie from the judgment in his favor at the new trial, would have to be prosecuted beyond the Appellate Court to correct the errors now belaboring the case, and the only relief that could be granted would be to order a third trial in order to restore to the relator the benefit and protection of the Federal Safety Statutes in accord with the judgment he has properly obtained.

2. The Appellate Court order is void because it deprives the relator of his right to present his case under the provi-

sions of the Federal Boiler Inspection Act and the Federal Safety Appliance Act.

3. The tender of the engine, upon which relator was riding at the time of the injury, *was equipped with a rear light permanently affixed thereto,* and there was a dispute in the evidence relative to whether this light was defective or not, and since the Boiler Inspection Act provides that "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put," the Appellate Court had no authority to deprive relator of his federally created right under this statute, by stating that a defect in this appurtenance, which was attached to and a part of the tender, can not be made the basis of an action under the Boiler Inspection Act.

4. There was no authority for the Appellate Court to reverse the judgment because of instructions permitting recovery under the Boiler Inspection and Safety Appliance Acts. The instruction relative to the Boiler Inspection Act is numbered 6 on page 11 of the Petition for Leave to file application for writ of mandamus, but since some of the language was inadvertently left out in copying the instruc- [fol. 40] tion, we herewith set forth a correct copy of the instruction, underlining the words left out in the copy contained in the petition.

> "Under the provisions of the Federal Boiler Inspection Act, it is the defendant's duty to furnish a locomotive, its boiler, tender, and all parts and appurtenances thereof, in proper condition and safe to operate in the service to which the same are put, and that may be employed in active service, without unnecessary peril to life and limb.
>
> "If you find from a preponderance or greater weight of the evidence that at the time of the injuries complained of by the plaintiff, William E. Woods, that the plaintiff and the defendant were engaged in interstate commerce and transportation, *and if you find from the greater weight of the evidence that the defendant failed to equip its locomotive and tender with an efficient and properly focused light,* and if you further

find from the greater weight of the evidence that to equip such locomotive and tender with such a light caused, or proximately contributed to cause unnecessary peril to the life and limb of the plaintiff and made the said locomotive unsafe to operate in the service to which such locomotive and tender were put, you may then find that the defendant has violated the Federal Boiler Inspection Act; and if you further find that the furnishing of such locomotive and tender with a light that was dim and out of focus directly and proximately caused injuries to be sustained by this plaintiff, William E. Woods, then, even though you may find from the greater weight or preponderance of the evidence that the plaintiff was guilty of contributory negligence, the Federal Boiler Inspection Act denies to the defendant, and deprives the defendant of the defense of contributory negligence on the part of the plaintiff and such contributory negligence, if any, will not act as a bar nor dimi-sh the right of the plaintiff to recover full damages for such injuries, if any, he has sustained."

5. *There is precedent for reviewing the action of a lower court, even though the case is remanded for a new trial.* In the case of Floyd Affolder v. New York, Chicago & St. Louis Railroad Co., U. S. Supreme Court Law. Ed. Advance Opinions, Vol. 94-No. 1, page 37, the Supreme Court of the United States granted a Writ of Certiorari on October 10, 1949, to review the action of the Court of Appeals for the Eighth Circuit, 174 Fed. (2d) 486. This was an action under the Safety Appliance Act and the Court of Appeals reversed the judgment of the trial court and remanded the case for a new trial upon the theory that the jury had not been properly instructed.

The cases cited under Point I, Page 6, of our Suggestions and Authorities in Support of Petition For Leave to File Application For Writ of Mandamus show that this court has power by writ of mandamus to order the judgment of the Appellate Court expunged and the judgment of the Superior Court of Cook County affirmed.

[fol. 41] In Armstrong v. Obucino, 300 Ill., 140 at page 142, this Court said:

" 'The statement has very frequently been made that where a court has jurisdiction of the parties and sub-

ject matter, its decree, however erroneous, can only be attacked on appeal or error; but the rule is subject to an exception equally well settled,—that a decree may be void because the court has exceeded its jurisdiction. * * * Courts are limited in the extent and character of their judgments, and if they transcend their lawful powers their judgments and decrees are void and may be collaterally impeached wherever rights claimed under them are brought in question. The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment or decree, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds according to the established modes governing the class to which the case belongs and does not transcend in the extent and character of its judgment or decree the law or statute which is applicable to it.' ''

We submit that the Appellate Court in the action in which the relator was plaintiff transcended its lawful powers and that its judgment reversing the judgment of the Superior Court of Cook County is void and should be expunged, and that the judgment of the Superior Court of Cook County should be reinstated and affirmed.

In seeking to have this court review the decision of the Appellate Court we have filed a Petition for Leave to Appeal and for Writ of Error. We suggest that the court reconsider its denial of our motion for leave to file petition for Writ of Mandamus and permit the filing thereof, withholding judgment as to whether the writ shall issue until the determination of the question of whether an appeal will be permitted from the judgment of the Appellate Court, or in the alternative take this motion under advisement until such time as this court may determine if any other adequate remedy is available to the relator.

We, therefore, respectfully urge this court to re-consider its action of January 10, 1950, denying our motion for leave to file an original petition for writ of mandamus, and to grant said motion in order that the petition and answer filed in response thereto, may be considered together with other proceedings seeking a review of the Appellate Court's decision, at the next term of this Honorable Court, so that substantial justice may be done, and relator may have some

assurance that an appeal, from an order denying to him his federally created rights, may be granted.

Respectfully submitted, by Joseph A. Londrigan, Harry G. Fuerst and Schwartzberg & Barnett, Attorneys for Petitioner.

[fol. 42] [Endorsed:] Copy. No. 31427. In the Supreme Court of Illinois. The People of the State of Illinois on Relation of William Edward Woods, Petitioner, vs. John M. Touhy, Presiding Justice, Grover C. Niemeyer and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents. Motion to Re-Consider Order Denying Motion for Leave to File an Original Petition for Writ of Mandamus. Joseph A. Londrigan, 916 Ridgely Building, Springfield, Illinois and Harry G. Fuerst and Schwartzberg & Barnett, Attorneys for Petitioner.

[fol. 43] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of January in the year of our Lord, one thousand nine hundred and fifty, within and for the State of Illinois.

Present: Charles H. Thompson, Chief Justice; Justice Francis S. Wilson, Justice William J. Fulton, Justice Joseph E. Daily, Justice Walter T. Gunn, Justice Jesse L. Simpson, Justice Albert M. Crampton, Ivan A. Elliott, Attorney General; Harry G. Newman, Marshal.
Attest: Earle Benjamin Searcy, Clerk.

Be it remembered, that, to-wit: on the 18th day of January, A.D. 1950, the same being one of the days of the Term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 31427

PEOPLE ex rel. WILLIAM EDWARD WOODS, Petitioner

vs.

JOHN M. TOUHY, Presiding Justice, GROVER C. NIEMEYER and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents

MANDAMUS

And now, on this day, the Court having duly considered the motion by petitioner for reconsideration of the order denying motion for leave to file an original petition for writ of mandamus, and being now fully advised of and concerning the premises, doth deny the motion for reconsideration.

[fol. 44] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois, and keeper of the records and Seal thereof, do hereby certify the foregoing to be a true copy of the record of this Court in a certain cause entitled:

No. 31427

PEOPLE ex rel. WILLIAM EDWARD WOODS, Petitioner

vs.

JOHN M. TOUHY, Presiding Justice, GROVER C. NIEMEYER and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents

MANDAMUS

Filed in this office on the 31st day of December A.D. 1949

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 30th day of March 1950.

Earle Benjamin Searcy, Clerk. Supreme Court of the State of Illinois. (Seal.)